DOCKET

No. 88-1182-CSX
Status: GRANTED

Title: Baltimore City Department of Social Services, Petitioner
v.
Jacqueline Bouknight

Docketed:
January 18, 1989

Court: Court of Appeals of Maryland

Vide: 88-6651

Counsel for petitioner: Tyler III,Ralph S.

Counsel for respondent: Burns,George

Entry	Date	Note	Proceedings and Orders
1	Dec 19 1988	G	Application (A88-494) for a stay pending the filing and disposition of a petition for a writ of certiorari, submitted to The Chief Justice.
2	Dec 19 1988		Application (A88-494) granted by the Chief Justice pending receipt of responses and further order.
3	Dec 19 1988		Response to application (A88-494) requested by The Chief Justice, due December 21, 1988.
4	Dec 20 1988		Response to application (A88-494) filed by Respondent.
5	Dec 21 1988		Response to application (A88-494) filed by Maurice M..
6	Dec 21 1988		(A88-494) Application for a stay granted by Rehnquist, CJ.
7	Jan 18 1989	G	Petition for writ of certiorari filed.
8	Jan 18 1989		Appendix of petitioner Baltimore City Dept. of Soc. Svcs. filed.
9	Feb 13 1989		Brief amicus curiae of Advocates for Children and Youth Inc. filed.
10	Feb 17 1989		Brief of respondent Jacqueline Bouknight in opposition filed.
11	Feb 17 1989	G	Motion of respondent Jacqueline Bouknight for leave to proceed in forma pauperis filed.
12	Mar 1 1989		DISTRIBUTED. March 17, 1989
16	Mar 20 1989		REDISTRIBUTED. March 24, 1989
18	Mar 27 1989		REDISTRIBUTED. March 31, 1989
19	Apr 3 1989		Motion of respondent Jacqueline Bouknight for leave to proceed in forma pauperis GRANTED.
20	Apr 3 1989		Petition GRANTED. limited to the following questions: 1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination? 2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury? The case is consolidated with No. 88-6651 and a total of one hour is allotted for oral argument.
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22	Apr 13 1989		Order extending time to file brief of petitioner on the merits until June 1, 1989.
23	May 10 1989		Record filed.
		*	Certified copy of original record received. (Vide: 88-6651).

No. 88-1182-CSX

Entry	Date	Note	Proceedings and Orders
24	Jun 1 1989		Joint appendix filed. VIDED.
25	Jun 1 1989		Brief of petitioner Baltimore City Dept. of Social Services filed.
26	Jun 1 1989		Brief amici curiae of Massachusetts, et al. filed. VIDED.
27	Jun 1 1989		Brief amicus curiae of Advocates for Children and Youth Inc. filed. VIDED.
28	Jun 1 1989		Brief amici curiae of U. S. Conference of Mayors, et al. filed. VIDED.
29	Jun 1 1989		Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED.
30	Jun 1 1989		Brief amicus curiae of Juvenile Protective Assn. filed.
33	Jun 1 1989		Brief amicus curiae of Charles M. filed. VIDED.
34	Jun 1 1989		Brief of petitioner Maurice M. filed. VIDED.
32	Jun 7 1989		Order extending time to file brief of respondent on the merits until July 14, 1989.
36	Jun 19 1989	G	Motion of petitioner Maurice M for divided argument filed.
35	Jul 6 1989		Brief of respondent Jacqueline Bouknight filed. VIDED.
37	Jul 27 1989		CIRCULATED.
38	Aug 4 1989	X	Reply brief of petitioner Baltimore City Dept. of Social Services filed.
39	Aug 11 1989	X	Reply brief of petitioner Maurice M. filed. VIDED.
41	Aug 28 1989		SET FOR ARGUMENT TUESDAY, NOVEMBER 7, 1989. (2ND CASE)
40	Aug 30 1989		Motion of petitioner Maurice M for divided argument GRANTED.
42	Nov 7 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 88-1182

Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Maryland Court of Appeals held that a juvenile court's civil contempt order compelling a mother to produce her child before the court violated the Fifth Amendment. This case presents these questions:

I. Does the constitutional privilege against giving self-incriminating testimony apply to a court order compelling a mother to produce her previously abused infant child before the court and, if so, has the mother waived any applicable Fifth Amendment privilege?

II. If the constitutional privilege against giving self-incriminating testimony applies to this case, is the mother's Fifth Amendment privilege outweighed by the child's right to protection from further abuse?

LIST OF PARTIES

The parties to this proceeding below were the Baltimore City Department of Social Services, appellee in the court below; Maurice M., also appellee; and Jacqueline Bouknight, appellant below.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

The Baltimore City Department of Social Services, an agency of the State of Maryland ("the State"), respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The Court of Appeals of Maryland and the Circuit Court for Baltimore City (Division for Juvenile Causes) have decided the issues raised by this petition. The December 19, 1988 opinion of the Court of Appeals, captioned In Re: Maurice M., No. 50 (September Term, 1988), will be reported at _____ Md. _____, ____ A.2d ____, and is reprinted in the separate appendix to this petition ("App.") at 15a-80a. The circuit court's orders are unreported and are reprinted App. at 81a-87a.

This Court's December 19, 1988 Order, staying the judgment of the Court of Appeals of Maryland, Baltimore City Department of Social Services v. Bouknight, No. A-494 (Rehnquist, C.J., Circuit Justice), is reprinted App. at 12a-13a. This Court's December 21, 1988 Order and in-chamber Opinion in No. A-494 (Rehnquist, C.J.),

extending the stay pending the timely filing and disposition of this petition, are reprinted App. at 1a-11a.[1]

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on December 19, 1988. This petition was filed within 90 days of that judgment; therefore, this Court has jurisdiction pursuant to 28 U.S.C. §§1257(3), 2101(c).

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[1] The State's December 19, 1988 emergency application for a stay of the judgment of the Maryland Court of Appeals represented that the State would file its petition within 35 days of the state court's decision. The December 21, 1988 stay entered in No. A-494 is to continue pending disposition of this petition as the petition is timely filed, before January 23, 1989. (App. at 1a-2a, 11a.)

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Maurice M. was born on October 3, 1986. His short life has been marked by shocking neglect and extreme abuse. There is no doubt that his mother, respondent Jacqueline Bouknight, has been unable to protect him from harm and "[t]here is hard evidence in this case suggesting that Bouknight has abused Maurice. . . ." (Rehnquist, C.J.) (App. at 8a.) For example, when Maurice was hospitalized at age

three months, x-rays confirmed multiple fractures of major bones and his mother was observed shaking him and dropping him into his crib while he was in a cast. (App. at 16a-18a; 55a-57a.)[2]

In juvenile court proceedings in 1987, Maurice was determined to be a Child in Need of Assistance, see §§ 3-801, et seq., Courts and Judicial Proceedings Article, Md. Ann. Code. In July, 1987, physical custody of Maurice was returned to his mother, subject to the juvenile court's Order of Protective Supervision to the Baltimore City Department of Social Services ("DSS"). That Order

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[2] The facts of this case, including the physical injuries to Maurice and other acts of neglect and abuse, are not in dispute. A more detailed statement of these undisputed facts is set forth in the majority and dissenting opinions of the Court of Appeals. (App. at 16a-18a; 55a-57a.) See also in-chamber opinion in No. A-494 (Rehnquist, C.J.)(App. at 4a-5a.)

"placed Maurice with his mother under a carefully structured agreement. Among other things, the mother agreed to cooperate with DSS, attend parenting classes, utilize the assistance of a parent aide provided by DSS, and refrain from corporal punishment of the child." (McAuliffe, J., dissenting) (App. at 56a.)

In April, 1988, DSS informed the juvenile court that Ms. Bouknight had ceased cooperating with it; that she had also failed to comply with other terms of the agreed-to Order of Protective Supervision; that Maurice had not been seen for about a month; and that DSS feared for his safety because of the history of abuse in the case and the mother's known use of drugs and current threats to kill herself. (McAuliffe, J., dissenting) (App. at 56a-57a.) DSS asked the court to order the mother to produce Maurice immediately. The DSS petition and the court's

order to show cause were served on the mother, but she failed to attend the hearing. (App. at 83a-84a; 19a-20a.) She was thereafter arrested and brought before the court. (App. at 20a.)

The court ordered her to disclose the whereabouts of Maurice. Ms. Bouknight first answered this question falsely ("with my sister in Dallas, Texas") (App. at 20a-21a), and then at a subsequent hearing, she refused to produce Maurice or inform the court or anyone in authority of his whereabouts. She was then cited for civil contempt and jailed until she purged herself of contempt either by producing Maurice or revealing his location. (App. at 21a-22a.) Significantly, Ms. Bouknight has never claimed that she cannot produce Maurice. Indeed, "[t]here is no indication that she is unable to comply" with the juvenile court's order to produce Maurice. (Rehnquist, C.J.) (App. at 3a-4a.)

After being cited for contempt, Ms. Bouknight's counsel told the court that her opportunity to purge was not a constitutional one "if her purging herself may involve admitting to a crime of some sort." The court rejected this argument. (App. at 22a.) Further hearings were held in the juvenile court at which formal Fifth Amendment objections to the contempt citation were raised and rejected. (App. at 23a-24a.)

Ms. Bouknight appealed the juvenile court's contempt finding, claiming that she was being held in violation of her Fifth Amendment rights. (App. at 24a.) The Court of Appeals of Maryland, the highest court in the State, granted certiorari prior to judgment in the intermediate appellate court, and heard the case on an expedited basis. On December 19, 1988, the court, two judges dissenting, reversed the juvenile court's contempt finding, holding that it violated

Ms. Bouknight's Fifth Amendment rights, and ordered her immediate release from jail. (App. at 53a).

The State immediately filed a motion with the Court of Appeals seeking a stay of the judgment pending the filing with this Court and this Court's disposition of a petition for a writ of certiorari. That motion was denied on December 19, 1988. (App. at 14a.) The State then filed an emergency motion with this Court seeking the same relief. Chief Justice Rehnquist, sitting as Circuit Justice, granted a stay on December 19, and then extended the stay on December 21, 1988. (App. at 12a-13a; 1a-11a.)

REASONS FOR GRANTING REVIEW

SUMMARY

This case presents issues of truly overriding social and legal importance: whether, notwithstanding an undisputed prior

history of extreme child neglect and abuse, the Fifth Amendment privilege is so broad and absolute as to deny the judicial branch any effective means to compel a parent to produce her infant child before the court so that the court can protect the child from further harm. This case warrants review because the decision below is an unprecedented expansion of an individual's right to claim the privilege against self-incrimination at the expense of a child's right to protection from abuse.

The State's position is that complying with a court order to produce a child is a purely non-testimonial act and thus not "testimony" protected by the Fifth Amendment privilege. This Court has held repeatedly that the Fifth Amendment does not bar potentially incriminating state-compelled actions, including standing in a lineup, furnishing a blood sample, or giving a handwriting exem-

plar, because these acts are not testimony. Those holdings require reversal here.

Assuming the Fifth Amendment applies to the act of producing Maurice before the court and assuming further that Ms. Bouknight has not waived any Fifth Amendment privilege she might have, the State further contends that the juvenile court's statutory duty to protect this abused and neglected child outweighs his mother's constitutional privilege against self-incrimination.

Maryland's highest court gave a tortured and rigid reading to the constitutional provision. It reached a result which conflicts with controlling decisions of this Court and with decisions of other state appellate courts. The Fifth Amendment simply does not empower the mother of an abused child to shackle the juvenile court and prevent that court from discharging its crucially important constitutional mission of

child protection. This Court should grant review in this case to reverse the unsound and ultimately dangerous rule of federal constitutional law announced by the Maryland Court of Appeals.

I. THE DECISION BELOW CONFLICTS WITH CONTROLLING FIFTH AMENDMENT DECISIONS OF THIS COURT.

A. Complying With A Court Order To Produce A Child Is Not Testimony Protected By The Fifth Amendment.

The Court of Appeals vacated the trial court's contempt order on the ground that "the compelled act of producing Maurice in court, although not requiring Bouknight to utter a sound, or compelling her to verbally disclose Maurice's whereabouts, is implicitly at the least a testimonial communication within the contemplation of the Fifth Amendment privilege. . . ." (App. at 42a.) This case, therefore, raises the "important question about whether acts - such as the act of production of Maurice on the part of

Bouknight - would constitute testimony for purposes of the Fifth Amendment." (Rehnquist, C.J.) (App. at 8a.) While this Court has never addressed the applicability of the Fifth Amendment privilege in this specific context, the rationale of its prior decisions mandates reversal of the court below.

The Fifth Amendment "protects a person only against being incriminated by his own compelled testimonial communications." Fisher v. United States, 425 U.S. 391, 409 (1976) (emphasis added). Thus, a person may be compelled to furnish a blood sample, Schmerber v. California, 384 U.S. 757, 765 (1966); to provide a handwriting exemplar, Gilbert v. California, 388 U.S. 263, 266-67 (1967), or a voice exemplar, United States v. Dionisio, 410 U.S. 1, 7 (1973); to stand in a lineup, United States v. Wade, 388 U.S. 218, 221-23 (1967); to stop at the scene of an accident and give one's name and address,

California v. Byers, 402 U.S. 424, 431-34 (1971) (plurality opinion); to wear particular clothing, Holt v. United States, 218 U.S. 245, 252-53 (1910); and to execute a consent form authorizing the release of bank records, Doe v. United States, 487 U.S. ___, 108 S.Ct. 2341, 2350-52 (1988).

The Fifth Amendment does not, therefore, prohibit the state from compelling an individual to perform an act, even though that act may be highly incriminating, if the act is not testimonial. That principle controls this case. Ms. Bouknight can comply with the juvenile court's order by actions that involve no testimony; she can purge herself of contempt without giving any testimony.[3]

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[3]The fact that Ms. Bouknight is currently in jail is not to the contrary. First, of course, she had the opportunity to avoid ever going to jail by producing the child in court at any time prior to her arrest. Ms. Bouknight has never claimed otherwise. Further,

As the court below conceded, she can comply without "utter[ing] a sound." (App. at 42a.) Notwithstanding this concession, the court held that the trial court's contempt order violated the Fifth Amendment as it required Ms. Bouknight to "necessarily admit a measure of continuing control and dominion over Maurice's person" which could incriminate her if Maurice were dead or criminally abused. (App. at 41a.) That analysis is fundamentally flawed.

First, it focuses entirely on the potential incrimination of producing Maurice

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notwithstanding the fact that she is now in jail, Ms. Bouknight has access, both in person and by telephone, to her counsel to whom she could give information that would lead to Maurice being produced in court. If Ms. Bouknight were to tell her counsel of the whereabouts of Maurice, that "testimony", i.e., the words themselves, would be a privileged attorney-client communication, see Maryland Lawyers' Rules of Professional Conduct 1.6, as well as being privileged under the Fifth Amendment. See Fisher v. United States, 425 U.S. at 398.

in court without distinguishing between "testimony" and "non-testimonial conduct", and without explaining why the act of responding to a court order to produce, without "uttering a sound", is "testimonial". If an act is not "testimonial", the Fifth Amendment is inapplicable, see, e.g., Fisher, 425 U.S. at 409, and an act does not become testimonial simply because it is potentially very incriminating. See, e.g., Schmerber.

Second, Maurice's "possession" is, in a testimonial sense, truly a "foregone conclusion" and of "minimal testimonial significance". Fisher, 425 U.S. at 411-12. There is no dispute that the mother had custody of Maurice for she regained custody only because the juvenile court returned Maurice to her, subject to its jurisdiction. (App. at 85a-87a.) Furthermore, "on at least two occasions [she] freely admitted her

continuing control of the child at the very times she was required to produce him." (McAuliffe, J., dissenting) (App. at 67a.)

The holding below, that complying with a court order to produce a child in court is testimony within the meaning of the Fifth Amendment, conflicts with applicable decisions of this Court. See Sup. Ct. R. 17.1(c). This Court should grant review and reverse that decision.

B. If The Fifth Amendment Applies To This Case, The Privilege Has Been Waived.

Even if Ms. Bouknight had a Fifth Amendment privilege to refuse to produce Maurice, a highly doubtful proposition and one which the State certainly disputes, she plainly has waived that privilege. Ms. Bouknight first waived her "right" to refuse to produce her child because in the August, 1987 stipulation and agreed-to Order of Protective Supervision, signed by her

attorney, she agreed to cooperate with DSS. (App. at 85a-87a.) Ms. Bouknight thus waived her right to complain that the subsequent contempt order, which seeks nothing more than specific performance of the earlier and never challenged order to cooperate, violates her Fifth Amendment privilege. See Shapiro v. United States, 335 U.S. 1, 16-20 (1948); Curcio v. United States, 354 U.S. 118, 123-24 (1957).[4]

Before Ms. Bouknight was held in contempt, and with counsel at her side, she voluntarily told the trial judge that Maurice

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[4] "Were the cloak of the privilege to be thrown around * * * [Ms. Bouknight's refusal to cooperate when that is what she agreed to do] effective enforcement of many federal and state laws would be impossible." United States v. White, 322 U.S. 694, 700 (1944). Therefore, as Judge McAuliffe noted in his dissent below, Ms. Bouknight waived her Fifth Amendment privilege "when she assumed custody of the child from the State." (App. at 77a.)

was with her sister in Dallas, Texas. (App. at 20a-21a.) Having once answered that question, albeit untruthfully, Ms. Bouknight waived her right to refuse to answer it a second time. See Rogers v. United States, 340 U.S. 367, 374 (1951).

The court below held that Ms. Bouknight did not waive her Fifth Amendment rights. (App. at 43a-46a.) That holding should be reviewed and reversed because it is in sharp conflict with this Court's Fifth Amendment waiver decisions. See Sup. Ct. R. 17.1(c).

II. THIS CASE PRESENTS THE IMPORTANT QUESTION OF FIRST IMPRESSION OF WHETHER THE COMPELLING SOCIETAL INTEREST IN PROTECTING A CHILD FROM ABUSE OUTWEIGHS ANY APPLICABLE FIFTH AMENDMENT PRIVILEGE.

This case also presents a fundamental issue "which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c). That issue is whether the Fifth Amendment privilege, assuming both its applicability to this case and that it has not been waived,

must yield to the juvenile court's demand for information to fulfill its crucial and non-prosecutorial obligation to protect children. The Court of Appeals of Maryland read the constitutional provision to deny the judiciary, and thus to deny our society, any effective means to protect a child from a parent who has manifested a brutal inability to protect him. That cannot be the constitutional law of the United States.

In California v. Byers, 402 U.S. 424, 427 (1971) (plurality opinion), this Court recognized that the Fifth Amendment does not absolutely prohibit a State from obtaining information for a legitimate and non-prosecutorial purpose: "Tension between the State's demand for disclosures and the protection of the right against self-incrimination • • • must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on

the other. . . ." Thus, over Fifth Amendment objections, Byers upheld a state law requiring the driver of a motor vehicle involved in an accident to stop and give his name and address:

> Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute.

402 U.S. at 458 (Harlan, J., concurring).

In this case, "a citation for civil contempt in order to obtain the production of a child such as Maurice M. or knowledge about his whereabouts, is not essentially criminal in nature and aims primarily at securing the safety of the child." (Rehnquist, C.J.) (App. at 11a.) Thus, like Byers, the disclosure sought here "was not intended to facilitate criminal convictions", 402 U.S. at 430, but was statutorily authorized in

accordance with the State's fundamental social policy to protect children.[5] This policy is obviously non-prosecutorial in purpose and is explicitly stated in state law:

> To provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest.

Section 3-802(a)(1), Courts and Judicial Proceedings Art., Md. Ann. Code.

Although the court below recognized that "[t]he State is, of course, mandated to protect Maurice" (App. at 40a), it rejected

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[5] As the dissent below pointed out, "[e]ven in the face of evidence of child abuse, no criminal charges were brought. Viewing the entire history of this case in perspective, it cannot rationally be suggested that the motive of DSS in seeking a court order for the production of Maurice was to gain evidence for use in a criminal prosecution." (App. at 75a.)

any balancing of Ms. Bouknight's privilege claim against the substantial State interest in protecting Maurice and disregarded Maurice's rights. Because he has rights and because those rights must be protected, the juvenile court must have the power to require his unwilling parent to bring him before the court.[6] Without that power, the court cannot protect Maurice.

Without the possibility of the court's protection, Maurice is entirely at the mercy of a parent who has demonstrated a total inability to protect him from gross harm. Under these circumstances, "the need for answers to questions in a situation posing a

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[6] The Maryland legislature certainly intended for the juvenile court to have the power of contempt to compel an unwilling mother to produce her child before the court. See § 3-814(c), Courts and Judicial Proceedings Art., Md. Ann. Code.

threat to the public safety [i.e., the safety of a child], outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." New York v. Quarles, 467 U.S. 649, 657 (1984).[7]

The refusal of the court below to conclude that Ms. Bouknight's constitutional claim must be balanced against Maurice's need for protection is an issue of great importance which warrants review by this Court. Unlike this Court's analysis in both

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[7] Last Term in Braswell v. United States, 487 U.S. __, 108 S.Ct. 2284, 2294 (1988), this Court refused to recognize a Fifth Amendment privilege "on behalf of the records custodians of collective entities [because to do so] would have a detrimental impact on the Government's efforts to prosecute 'white collar crime'. . . ." Similar, if not more fundamental, policy considerations are applicable here. Recognition of a Fifth Amendment privilege in this case would have a highly "detrimental impact" on the State's efforts to protect children.

Byers and Quarles, the Court of Appeals truly failed to consider, indeed it seemed to feel that the Fifth Amendment precluded it from considering (App. at 52a-53a), the tremendous social costs of the rule it imposed.

In contrasting the result below with that in Byers, the Chief Justice noted that "[p]rotecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents." (App. at 11a.) This Court should review this case to decide if the court below was correct when it held that the Constitution is so rigid that it demands a rule which effectively prohibits the judiciary from protecting a child.

An additional reason for granting review is to resolve the conflict between the decision below and other state court decisions. See Sup. Ct. R. 17.1(b). Prior

to the decision below, state courts had rejected the view that Fifth Amendment claims must prevail at the expense of child protection. See In the Matter of the Welfare of J.W. and A.W., 391 N.W.2d 791, 795 (Minn. 1986), cert. denied sub nom., Minor v. Bureau of Social Services, 107 S.Ct. 899 (1987); People v. Salinas, 182 Cal.Rptr. 683, 692 (Cal. Ct. App. 1982); Department of Social Services v. Beam, 371 N.W.2d 446, 447 (Mich. Ct. App. 1985); Commissioner of Social Services of New York City v. Patricia A., 432 N.Y.S.2d 137, 142-43 (N.Y. Fam. Ct. 1980).

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, that judgment should be reversed.

Respectfully submitted,

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APPENDIX

88-1182

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

No. A-494

BALTIMORE CITY DEPARTMENT
OF SOCIAL SERVICES,

Applicant,

v.

JACQUELINE BOUKNIGHT

O R D E R

UPON FURTHER consideration of the application for stay and the responses filed thereto,

IT IS ORDERED that the stay heretofore entered by the undersigned on December 19, 1988, be and the same is hereby continued pending the filing of a petition for writ of certiorari on or before January 23, 1989. If the petition is filed on or before January 23, 1989, this order is to continue in effect pending this Court's action on the petition

for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 21st
day of December, 1988

SUPREME COURT OF THE UNITED STATES

No. A-494

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES v. JACQUELINE BOUKNIGHT

ON APPLICATION FOR STAY

[December 21, 1988]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The Baltimore City Department of Social Services has asked me to stay the judgment of the Court of Appeals of Maryland in this case, In Re: Maurice, No. 50. The Court of Appeals held that her confinement for civil contempt violated the privilege against self-incrimination secured to her by the Fifth Amendment to the United States Constitution. Bouknight is presently incarcerated until she either presents her child, Maurice M., to the Department of Social Services (DSS) or tells where the child can be found. There is no indication

that she is unable to comply in one way or the other.

When Maurice was three months old, he was admitted for treatment of a fractured left leg. X-rays disclosed that the child had previously suffered multiple fractures of various other major bones. Nurses and others observing Maurice's mother at the hospital reported her unusual conduct with the child, including shaking him and dropping him into his crib when he was in a cast. Because of the suspicious nature of Maurice's injuries at such a young age, DSS obtained authorization to place the child in foster care. It then filed a petition in the circuit court for Baltimore City seeking a determination that Maurice was a Child In Need of Assistance under Maryland law, Md. Code. §3-801(e) et seq. Maurice was found to be such.

By agreement of the parties, Bouknight received custody of Maurice under an order of protective supervision specifying that she accept parenting assistance, attend classes, and refrain from corporal punishment of the child. Some months later, DSS advised the court that Bouknight had ceased cooperating with it, and that she had refused to produce the child or tell DSS where he was. DSS feared for Maurice's safety because Bouknight was not complying with the court order, because of her history of child abuse, because of her known use of drugs and current threats to kill herself, and because Maurice had not been seen for nearly a month and could not be located by DSS or the police.

Bouknight did not attend the hearing set to consider these representations, but was later arrested and ordered to disclose the whereabouts of Maurice. After giving a false answer, she was jailed until she purged

herself of contempt by either producing Maurice or revealing his location.

The Court of Appeals of Maryland granted certiorari and heard the case without decision by the state intermediate appellate court. It found that the terms of Bouknight's confinement violated her privilege against compulsory self-incrimination. Noting that some acts of production have been found testimonial, see United States v. Doe, 465 U.S. 605 (1984), it concluded that the act of producing Maurice would necessarily admit a measure of continuing control over the child which might be relevant in a subsequent criminal prosecution. That risk, it thought, was so substantial that it could not be outweighed by any governmental interest in finding Maurice. Two judges dissented. They argued that there were no testimonial components to compliance with the civil contempt order;

that if there were, they were clearly outweighed by the public interest in protecting children from abuse; and that Bouknight had waived any Fifth Amendment privilege against disclosing Maurice's whereabouts when she accepted conditional custody of the child from the city.

In my opinion DSS meets the requirements we have established for the issuance of a stay. See Rostker v. Goldberg, 448 U.S. 1306 (1981) (BRENNAN, J., Circuit Justice); California v. Riegler, 449 U.S. 1319, 1321 (1981) (REHNQUIST, J., Circuit Justice). First, the decision of the Court of Appeals of Maryland is unquestionably based on the United States Constitution. Second, I think the balance of equities favors the granting of a stay. There is undoubtedly a burden on Bouknight's liberty caused by her confinement, but against it must be weighed a very real jeopardy to a child's safety, well

being and perhaps even his life. There is hard evidence in this case suggesting Bouknight has abused Maurice in the past and may well do so again. If she is permitted to go free, DSS may not have an alternative means of obtaining information about the child or of locating the child.

Finally, I conclude that it is likely that four Justices of this Court will vote to grant certiorari in this case, and that DSS has a fair prospect of persuading a majority of the Court that the decision of the Court of Appeals of Maryland was erroneous. Of the claims made in the application to me, I think two fit this category. The first is an important question about whether acts - such as the act of production of Maurice on the part of Bouknight - would constitute testimony for purposes of the Fifth Amendment. See United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425

U.S. 391, 411-412 (1976); Schmerber v. California, 384 U.S. 757 (1966).

Second, and in my view equally as important, is whether even assuming there is a testimonial element in the act of surrendering Maurice, the Fifth Amendment privilege is available in this situation. In California v. Byers, 402 U.S. 424 (1971), we upheld a California law making it a crime to leave the scene of an auto accident without giving one's name and address. In that case we recognized that "[t]ension between a State's demand for disclosures and the protection of the right against self-incrimination" must "[i]nevitably . . . be resolved in terms of balancing the public need on the one hand, and the individual claim of constitutional protections on the other." Id., at 427 (Burger, C.J. plurality). This plurality found it significant that the law "was not intended to

facilitate criminal convictions but to promote the satisfaction of civil liabilities," Id., at 430, and was not aimed at a "highly selective group inherently suspect of criminal activities." Id., at 430, quoting Albertson v. SACB, 382 U.S. 70, 79 (1965).

"Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute." Id., at 458 (Harlan, J., concurring in the judgment.)

In New York v. Quarles, 467 U.S. 649 (1984) we recognized a public safety exception to the usual Fifth Amendment rights afforded by Miranda v. Arizona, 384 U.S. 436 (1984), so that police could recover a

firearm which otherwise would have remained in a public area. In the present case, a citation for civil contempt in order to obtain the production of a child such as Maurice M. or knowledge about his whereabouts, is not essentially criminal in nature and aims primarily at securing the safety of the child. Protecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents.

The state has offered to file a petition for certiorari within 35 days. The stay requested is therefore granted, pending consideration of a timely petition for certiorari and disposition of the same by the Court. If the petition is granted, the stay shall remain in effect until the Court disposes of the case or otherwise orders.

SUPREME COURT OF THE UNITED STATES

No. A-494

BALTIMORE CITY DEPARTMENT
OF SOCIAL SERVICES,

Applicant,

v.

JACQUELINE BOUKNIGHT

O R D E R

UPON CONSIDERATION of the application of the Attorney General of Maryland for a stay,

IT IS ORDERED that the effect of the judgment and the mandate of the Court of Appeals of Maryland, case No. 50, September Term 1988 filed November [sic] 19, 1988 be, and the same are hereby, stayed pending receipt of responses to the application on or before 12 noon, Wednesday, December 21, 1988, and further order of the undersigned or of the Court.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated This 19th

day of December, 1988

IN RE: • IN THE

MAURICE M. • COURT OF

• APPEALS OF

• MARYLAND

• No. 50

• Sept. Term, 1988

• • • • • • • • • • •

ORDER

Upon consideration of the State's Emergency Motion For Stay Of Mandate And For Stay Of Judgment And Request For Immediate Consideration filed in the above entitled case, it is this 19th day of December, 1988

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby denied.

/s/ Robert C. Murphy
Chief Judge

IN THE COURT OF APPEALS OF MARYLAND

No. 50

September Term, 1988

IN RE: MAURICE M.

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,
JJ.

Opinion by Murphy, C.J.
McAuliffe, J., dissents; Rodowsky, J., joins in part to dissent.

Filed: December 19, 1988

This case involves a challenge on Fifth Amendment self-incrimination grounds to the constitutionality of a civil contempt order entered by a Juvenile Court directing the mother of a juvenile "to produce him before the court or to reveal his exact whereabouts."[1]

I

Maurice M., the infant son of Jacqueline Bouknight, was admitted to the hospital on January 23, 1987, with a broken leg; he was then three months old. Because of the nature of Maurice's injuries, and the presence of

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[1]The Fifth Amendment provides, in pertinent part:

> "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ."

This provision is applicable to the States through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 3, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Article 22 of the Maryland Declaration of Rights is in pari materia with the Fifth Amendment provision. See Richardson v. State, 285 Md. 261, 265, 401 A.2d 1021 (1979) and Ellison v. State, 310 Md. 244, 259-260, n. 4, 528 A.2d 1271 (1987).

old, partially healed fractures, the Baltimore City Department of Social Services (DSS) obtained an authorization on February 11, 1987 to provide shelter care for the child and he was placed in foster care. DSS also filed a petition in the Circuit Court for Baltimore City (Division of Juvenile Causes), seeking a determination that Maurice was a child in need of assistance (CINA) under the provisions of Maryland Code (1984), § 3-801(e) et seq. of the Courts and Judicial Proceedings Article. The petition recited Maurice's history of injuries, the mother's history of emotional problems, her own former status as a CINA, the fact that she was seen to throw Maurice into his crib during his second hospitalization, that she was verbally abusive to the physicians and social workers, and that the father had just been released from prison for drug violations. At a hearing on May 19, 1987, Maurice, Jacqueline,

and DSS, each represented by counsel, stipulated to the essential facts as set forth in the petition and agreed to continue Maurice under the Shelter Care Order. On July 17, 1987, this order was modified and physical custody of Maurice was returned to Jacqueline.

At a hearing on August 18, 1987, Maurice was found to be a CINA. The parties agreed that Maurice would remain in Jacqueline's custody but would be placed under an Order of Protective Supervision to DSS and a DSS aide was assigned to assist Jacqueline with parenting skills. Under this order, Jacqueline agreed to "cooperate" with DSS, and to refrain from physically punishing Maurice.

By petition filed on April 18, 1988, DSS represented that Jacqueline had failed to cooperate with DSS and that she refused to provide a current address or to inform DSS of

Maurice's whereabouts. The petition also recited that Maurice's father had been shot to death the previous month and that Jacqueline now had a history of drug use. DSS also filed a Motion for Contempt against Jacqueline, alleging that DSS representatives had made a home visit on April 7, 1988, but were told by Jacqueline that Maurice "was in the care of an aunt; however, she refused to identify the aunt or provide the whereabouts of the child."[2]

On April 20, 1988, at a hearing before a Juvenile Master, at which Jacqueline declined to appear, DSS cited Jacqueline's failure to comply with the Order of Protective Supervision and was awarded custody of Maurice.

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[2] There was evidence that DSS representatives had not seen Maurice since September 4, 1987; that the DSS aide's efforts to see Maurice were thwarted by Jacqueline's statements that the child was not at home; and that Jacqueline had told police that Maurice was in the care of an aunt, but that the aunt had denied seeing Maurice.

On the same day, the court (Angeletti, J.) held a hearing on the contempt motion; neither Maurice nor Jacqueline appeared at the hearing although each was represented by counsel. DSS suggested to the court that it was dealing with a "very serious abuse case" because of Maurice's prior history of injuries, and he might even be dead. The court stated its belief that the child may be "in some jeopardy because of the actions of the mother in refusing to bring him in." At the conclusion of the hearing, the court ordered Jacqueline to show cause why she should not be held in contempt for failure to produce Maurice in court.

Jacqueline was subsequently arrested and brought before the court on April 27, 1988. At that hearing, the court (Mitchell, J.) engaged Jacqueline in a colloquy in the presence of her attorney. It asked her "the whereabouts of . . . Maurice." In response,

Jacqueline said that he was with her sister Barbara at a designated address in Dallas, Texas. Jacqueline's statement was not given under oath and no Fifth Amendment objection to the court's inquiry was entered on Jacqueline's behalf.

An immediate police investigation revealed that Jacqueline's sister had not seen Maurice. On April 28, 1988, Judge Mitchell found Jacqueline in contempt "for failing to produce [Maurice] before the court or to reveal his exact whereabouts." The order specified that Jacqueline be jailed until she purged herself of the contempt by (1) producing Maurice before the court, or (2) revealing to the court his exact whereabouts, or (3) by providing "information" about Maurice to the police, or DSS, or the court.

The court also conducted a hearing on the same day it entered its civil contempt order. At the hearing, Jacqueline's counsel told the court that Jacqueline "absolutely insists" that the child was with her sister in Texas. Counsel also told the court that Jacqueline's opportunity to purge herself was not a constitutional one "if her purging herself may involve admitting to a crime of some sort." The court, in response, said that Jacqueline was not being asked "to admit to anything"; that Jacqueline was not being asked "what has happened to the child or whether she committed any act that in anyway harmed the child"; and that the only thing that is required is that she produce Maurice. The court added that Jacqueline could purge herself of the contempt "through the means of a proper address, person or location for the child," i.e., by simply indicating to her counsel, "to anyone at the

jail, or anyone in authority, including this Court, that information."

At yet another hearing on May 18 before Judge Mitchell, Jacqueline moved to strike the contempt order on Fifth Amendment grounds. She claimed that the substance of the contempt "is that [Jacqueline] must verbally or physically produce statements or evidence that may tend to incriminate her." The court rejected the argument, concluding that it had jurisdiction to require disclosure of "the whereabouts of the minor child" and, in doing so, Jacqueline was not required to speak.

On May 26, 1988, a further hearing was granted on the Fifth Amendment issue. Jacqueline contended that to purge herself of the contempt she must "give testimony or speak" in violation of her self-incrimination privilege; that "the product of her mind has to yield the whereabouts of Maurice[;] . . .

she has to speak to someone, . . . to order some agent, through his mind, through his lips to produce Maurice." The court once again stated its view that its order to produce Maurice required only that Jacqueline perform an act -- that no testimony need be given. It said that the contempt order was issued "not because she refuses to testify . . . [but] because she has failed to abide by the Order of this Court, mainly the production of Maurice."

Jacqueline appealed. We granted certiorari prior to decision by the intermediate appellate court to consider the important issue raised in the case.

II

The Fifth Amendment privilege against self-incrimination extends "to compelling answers by parties or witnesses in civil litigation." Whitaker v. Prince George's County, 307 Md. 368, 385, 514 A.2d 4

(1986). It "protects a witness from being required to make disclosure, otherwise compellable in the trial court's contempt power, which could incriminate him in a later criminal prosecution." Id. at 385. See also In re Criminal Investigation No. 1-162, 307 Md. 674, 516 A.2d 976 (1986). The privilege "is confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). To sustain the privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered, might be dangerous because injurious disclosure could result." Id. at 486-87. The protection of the Fifth Amendment "not only extends to answers that would in themselves support a conviction

. . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute" the suspected offender. Id. at 486. The privilege must be accorded a liberal construction in favor of the right that it was intended to secure. Id. See also Ellison v. State, 310 Md. 244, 528 A.2d 1271 (1987).

It is the historic function of the Fifth Amendment to protect an individual from compulsory incrimination through his own testimony. United States v. White, 322 U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944). In Schmerber v. California, 384 U.S. 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the Court held that the privilege protects an accused "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Id. at 761. The Court said that the protection of the

privilege "reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." Id. at 763-64.

The question in Schmerber was whether the involuntary withdrawal of blood and the use of the analysis in a drunken driving prosecution infringed the Fifth Amendment privilege. In concluding that it did not, the Court emphasized that the privilege "is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the privilege]." Id. at 764. Citing prior precedents, the Court said that the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for

identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." Id. Quoting from Holt v. United States, 218 U.S. 245, 252-53, 31 S. Ct. 2, 54 L. Ed. 1021 (1910), the Court observed, Id. at 763, that the privilege against self-incrimination protects an individual from being a witness against himself; it is a prohibition "of the use of physical or moral compulsion to extort communications [from an accused], not an exclusion of his body as evidence when it may be material." Stated in other terms, "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), involved a summons directing an attorney to produce documents of a client; the question was whether the documents were constitutionally immune from summons in the hands of the client and retained that immunity in the hands of the attorney. The Court concluded that the client's Fifth Amendment privilege was not violated by enforcing the summons against the lawyer since the client was not thereby compelled to be a witness agianst himself. It said that the constitutional privilege "does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." Id. at 408 (emphasis in original). The Fifth Amendment, the Court emphasized, protects against "'compelled

self-incrimination, not [the disclosure of] private information.'" Id. at 401, quoting from United States v. Nobles, 422 U.S. 225, 233, n.7, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975). It observed that it is the extortion of the information from the accused that offends our sense of justice. Id. at 398. However, it continued, while a party is privileged from producing evidence, the party has no privilege from its production. Id. at 399.

At issue in United States v. Doe, 465 U.S. 605, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984) (Doe I) was whether, and to what extent, the Fifth Amendment privilege applied to concededly incriminating business records of a sole proprietorship. There, the sole proprietor was ordered by a grand jury subpoena to produce his business records. The Court recognized that a subpoena that demands production of voluntarily prepared

documents does not compel oral testimony nor require the subpoenaed party to restate or affirm the contents of the documents. Id. at 610-11. Quoting from Fisher, supra, 425 U.S. at 409-10, it observed that merely because records on their face might be incriminating would not violate the privilege since the privilege protects only against being incriminated by the individual's own compelled testimonial communications. Id. at 611. The Court said, however, that while the contents of the records may not be privileged, the act of producing the documents may be because the individual may thereby be compelled "to perform an act that may have testimonial aspects and an incriminating effect." Id. at 612. This may be so, the Court explained, because compliance with the subpoena tacitly concedes the existence of the demanded records, their possession or control by the party under subpoena, as well as the

authenticity of the records. Id. at 613. Noting the factual determination of the trial judge that "the act of producing the documents would involve testimonial self-incrimination," Id. at 613-14, the Court, declining to overrule that factual determination, held that the act of producing the documents was privileged. Id. at 617.

In Doe v. United States, ___ U.S. ___, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988) (Doe II), a court order compelled the defendant, the target of a grand jury investigation, to execute consent forms authorizing foreign banks to disclose records of his accounts, without identifying the accounts or acknowledging their existence. The defendant claimed that the compelled execution of the consent forms had "independent testimonial significance" that infringed his Fifth Amendment privilege against self-incrimination. 108 S. Ct. at 2345. In

concluding that the privilege was not thereby violated, the Court reviewed its earlier Fisher and Doe I cases, stating that there the issue "was whether the act of producing subpoenaed documents, not itself the making of a statement, might nonetheless have some protected testimonial aspects." Id. In those cases, the Court concluded "that the act of production could constitute protected testimonial communiation because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." Id. It said that the constitutional privilege "applies to acts that imply assertions of fact." Id. The Doe II Court said that "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information

[because] [o]nly then is a person compelled to be a 'witness' against himself." Id. This understanding, the Court said, was most clearly revealed in those cases in which it had held "that certain acts, though incriminating, are not within the privilege, citing Schmerber, supra (suspect may be compelled to furnish a blood sample); Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967) (providing a handwriting exemplar); United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) (providing a voice exemplar); United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (to stand in a lineup); and Holt v. United States, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021 (1910) (to wear particular clothing). As to these, it said that the privilege was not implicated because the suspect was not required to disclose any knowledge he might have or to

speak his guilt. The privilege may be asserted "only to resist compelled explicit or implicit disclosures of incriminating information." Id. at 2348. Thus, the Court held that the defendant's execution of the consent form was without testimonial significance "because neither the form, nor its execution, communicates any factual assertion, implicit or explicit, or conveys any information to the Government." Id. at 2350. It said that the form did not identify any particular bank, did not acknowledge that an account was in existence, or that it was controlled by the defendant. And assuming that such an account did exist, the form did not indicate whether information relating to the defendant was present at the bank. Therefore, the Court explained that it was for the Government to locate that evidence by its independent labors. Accordingly, the Court concluded that the defendant's

"compelled act of executing the form has no testimonial significance" because by signing the form, the defendant "makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account [n]or would his execution of the form admit the authenticity of any records produced by the bank." Id. The defendant's act of executing the form was, therefore, not compelled to obtain any knowledge which he possessed in violation of the Fifth Amendment privilege.

The Supreme Judicial Court of Massachusetts, in Com. v. Hughes, 380 Mass. 583, 404 N.E.2d 1239 (1980), concluded that a court order directing the defendant in a criminal case to produce a designated gun suspected of having been used in the commission of the offense violated the defendant's Fifth Amendment privilege. There, the defendant, charged with assault

with a handgun, refused to comply with the order that he produce the weapon or show present inability to do so. The gun had been legally registered to the defendant; the prosecution wanted it for ballistics testing. After recognizing that the defendant, without uttering a sound, could comply with the order by producing the weapon, the court nevertheless held that the defendant's producing the revolver would have sufficient testimonial aspects to initiate Fifth Amendment consideration. After reviewing Schmerber and Fisher, it recognized two kinds of "testimonial assertions" that were implied in the production of the gun, i.e., (1) a tacit admission of the existence and location of the weapon in the hands of the possessor and (2) implicit authentication that the weapon was that required to be produced by this order. Id. at 1243. In finding that the defendant's privilege had been infringed, the

court said, id. at 1244, that "[i]f the defendant should produce the revolver, he would be making implicitly a statement about its existence, location and control" which would be used to prove his possession and control of the weapon after the alleged crime was committed. The identical result was reached on markedly similar facts in Goldsmith v. Superior Court In & For Shasta, 199 Cal. Rptr. 366, 152 Cal. App. 3d 78 (1984).

United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970) involved a criminal charge of knowing possession of a forged alien registration card. There, because the defendant had been coerced into producing the card during a custodial interrogation, the court found a violation of the privilege against self-incrimination, reasoning that the defendant's act of compelled production implicitly admitted the card's existence,

location, and the defendant's control over it. The court said: "An individual should not be compelled to produce the crime itself." Id. at 176. In State v. Dennis, 16 Wash. App. 417, 558 P.2d 297 (1976), the defendant was convicted of possessing cocaine. The police coerced the defendant into producing bags of the illegal drug. The court found a violation of the Fifth Amendment privilege because the act of production virtually admitted the defendant's control. In State v. Alexander, 281 N.W.2d 349 (Minn. 1979), the court reversed a contempt adjudication which had been based on the defendant's failure to produce film which allegedly was possessed in violation of a criminal obscenity statute. The court concluded that the act of production was

tantamount to an admission of the defendant's control or possession of the film.

III

As earlier observed, Maurice is a CINA whose custody has been awarded to the DSS. In response to the court's directive that Bouknight release Maurice to DSS, she has refused to do so, insisting that he is with her sister in Texas, information which has proven to be incorrect. The State readily acknowledges that it is fearful that Maurice has been criminally abused or possibly is dead. In the circumstances, as disclosed by the record, the State concedes that Bouknight has a reasonable apprehension that she will be prosecuted if, in complying with the court's order, she produces Maurice in court or otherwise discloses his whereabouts to the authorities.

The State is, of course, mandated to protect Maurice as a CINA under the Juvenile

Causes Act, Code (1984 Repl. Vol.) § 4-101 [sic], et. seq. of the Courts and Judicial Proceedings Article. That it does not know of Maurice's present whereabouts is equally clear. To purge the contempt order and thereby free herself from imprisonment, Bouknight must impart information to someone sufficient to permit Maurice to be produced in court, or provide information of his present whereabouts. Should she do so, Bouknight will necessarily admit a measure of continuing control and dominion over Maurice's person. In these circumstances, if the information discloses that Maurice is now dead, or has been subject to criminal abuse, as the prosecution candidly fears, suspicion concededly would focus on Bouknight as the criminal agent. By disclosing the demanded information, therefore, Bouknight would, in the event a crime had been committed upon Maurice's person, be incriminating herself

by, in effect, disclosing the corpus delicti itself- under compulsion of the court's order.[3]

In the circumstances of this case, the compelled act of producing Maurice in court, although not requiring Bouknight to utter a sound, or compelling her to verbally disclose Maurice's whereabouts, is implicitly at the least a testimonial communication within the contemplation of the Fifth Amendment privilege, as explicated by the controlling case law. Either by the act of producing Maurice in court, or verbally disclosing his whereabouts, Bouknight is compelled to communicate facts. We therefore find that the court's contempt order is, in its entirety, violative of Bouknight's Fifth Amendment privilege and must be vacated.

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[3]Section 3-831 of the Courts Article suggests that Bouknight's refusal to relinquish Maurice's custody to DSS is itself a crime, punishable by imprisonment up to three years.

(A)

In so concluding, we have considered the State's argument that Bouknight waived her Fifth Amendment privilege by providing information to the court as to Maurice's presence at a designated address in Texas. When she made the statement to the court, Bouknight was not a witness and she was not under oath. Although represented by counsel at the time, the record does not disclose that Bouknight was informed by counsel or the court of her right to remain silent in the face of the court's inquiry. Moreover, Bouknight's inaccurate information concerning Maurice's whereabouts was not directly incriminating; indeed, it was likely intended to exculpate her from further inquiry by the court.

Waiver of a constitutional protection is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v.

Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). It is difficult to establish and cannot be inferred from a silent record. Barker v. Wingo, 407 U.S. 514, 525-26, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). To be valid, the waiver must be made knowingly, voluntarily and intelligently. Miranda v. Arizona, supra; Younie v. State, 272 Md. 233, 245, 322 A.2d 211 (1974). However, forfeiture of the Fifth Amendment privilege may be inferred from a course of conduct without any inquiry into intent. See Minnesota v. Murphy, 465 U.S. 420, 428, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981). The Supreme Court has held that an "individual under compulsion to make disclosures as a witness who reveal[s] information instead of claiming the privilege [loses] the benefit of the privilege." Garner v. United States, 424 U.S. 648, 653, 96 S. Ct. 1178, 47 L. Ed. 2d

370 (1976). See also United States v. Kordel, 397 U.S. 1, 7-10, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970); Adams v. State, 200 Md. 133, 144, 88 A.2d 556 (1952). Thus, if a witness "discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." Brown v. Walker, 161 U.S. 591, 597, 16 S. Ct. 644, 40 L. Ed. 819 (1896). But the loss of such a basic constitutional guarantee is not to be lightly inferred. Emspak v. United States, 349 U.S. 190, 196, 75 S. Ct. 687, 99 L. Ed. 997 (1955); Smith v. United States, 337 U.S. 137, 150, 69 S. Ct. 1000, 93 L. Ed. 1264 (1949). A statement will not preclude a refusal to make further disclosures on Fifth Amendment grounds unless it directly inculpates the witness and the witness could reasonably be expected to know that he might have waived the privilege. See Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438,

95 L. Ed. 344 (1951); United States v. Singer, 785 F. 2d 228 (8th Cir. 1986); Klein v. Harris, supra.

On the record before us, it is manifest that Bouknight's Fifth Amendment privilege remains intact and that her unsworn, nonincriminatory statement to the court was simply a lie. See United States v. Singer, 785 F.2d 228, 241 (8th Cir. 1986); Klein v. Harris, supra, 667 F.2d at 288; Balderas Cortez v. State, 735 S.W.2d 294, 303 (Tex. App.-Dallas 1987).

(B)

The State argues that if the Fifth Amendment applies, and the privilege has not been waived, the public right to protect its children, as manifested by the Juvenile Causes Act, outweighs Bouknight's constitu-

tional right against self-incrimination.[4] Consequently, we are urged to strike the balance between Bouknight's right to silence, and the court's obligation to protect Maurice, in favor of the child. To do otherwise, it is said, would strip the Juvenile Court of its ability to protect any child suspected of being abused. The State points out that the court's action in holding Bouknight in contempt followed the statutory prescription of § 3-814(c) of the Courts Article that if a parent "fails to bring the child before the court when requested . . . [,] [it] may proceed against the parent, for contempt." On Maurice's behalf, his counsel says that virtually every CINA case involves some allegation of abuse or

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[4] This question was not raised or considered at the trial. Under Md. Rule 8-131, we may nevertheless, in our discretion, decide the question for the guidance of the circuit court or to avoid the expense and delay of another appeal.

neglect which is potentially subject to criminal indictment; and that to apply the constraints of the Fifth Amendment in such cases is to afford the parent "carte blanche to conceal any negative information about the child's status despite explicit court orders to cooperate with agency officials." It is further suggested that in areas where, as here, the scope of state involvement is so extensive and that all citizens are expected to accept some risk of self-incrimination, individuals can be compelled to provide incriminating information, citing by way of example mandated production of tax records, securities filings, and other potentially incriminating vital records. Reliance is placed principally upon California v. Byers, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971) and United States v. Flores, 753 F.2d 1499 (9th Cir. 1985).

The issue in Byers was whether the

constitutional privilege against compulsory self-incrimination was infringed by an essentially regulatory California statute which requires the driver of a motor vehicle involved in an accident to stop and give his name and address. The Court's plurality opinion said that "tension" exists between the State's demand for disclosures that may have an incriminating potential and the protection of the right against self-incrimination. Id. at 427. These must be resolved, it said, "in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other." Id. It said that an organized society imposes many burdens on its constituents; it requires the filing of tax returns, that producers and distributors of consumer goods file informational reports on the manufacturing processes and the content of products, on the wages, hours, and

working conditions of employees. It recognized that securities filings require informational reports and that industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Id. at 427-28. It noted that in each of these instances "there is some possibility of prosecution . . . for criminal offenses disclosed by or deriving from the information that the law compels a person to supply." Id. at 428. But, the plurality continued, the mere possibility of incrimination, rather than a substantial possibility, is insufficient to defeat the strong policy in favor of a statutory reporting requirement. Id. It said that disclosure with respect to automobile accidents did not entail a substantial risk of self-incrimination; that the California statute was not intended to facilitate criminal prosecutions but to promote

satisfaction of civil liabilities arising from automobile accidents; and that consequently the self-incrimination privilege was not violated by the reporting requirement.

United States v. Flores, supra, involved a statutory reporting requirement that written notice be given to a carrier whenever firearms were being shipped to an unlicensed person. The Court found no violation of the defendant's right against self-incrimination by reason of the reporting requirement. While recognizing that "the privilege against self-incrimination . . . may only be limited for the most substantial of reasons," id. at 1500, the Court said that the Fifth Amendment

> "does not always demand substantial undercutting of valid and essential government regulation when the means to effect that regulation necessarily include disclosure of information which could lead to self-incrimination." Id. at 1501 (emphasis in original).

In so holding, the Court pointed out that the statute was "directed at a universe of

people," and did not operate in an area of activity "permeated with criminal statutes or directed at a group of persons inherently suspect of criminal activity." Id.

We think these cases are inapposite to the matter now before us. The State readily acknowledges that Bouknight's risk of incriminating herself is a substantial one, encompassing, among other possible crimes, the felony of child abuse and even murder. While it may be argued that the Juvenile Causes Act absolutely requires that Bouknight produce Maurice in court or provide information as to his location, and thus bears some kinship to a statutory reporting requirement, we simply are unable in the circumstances to, in effect, totally expunge Bouknight's Fifth Amendment rights where the risk of prosecution is so substantial. Assuming, arguendo, that there may be causes in which a balancing test is appropriate to

determine the existence of the Fifth Amendment privilege, we conclude that the case before us is not one of them. We accord the privilege a liberal construction, as we must, in favor of the right that it was intended to secure. Hoffman v. United States, supra, 341 U.S. at 486. While we must vacate the civil contempt order in this case, we recognize that Bouknight's conduct may be criminally punishable under § 3-831 of the Courts Article.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO ORDER JACQUELINE BOUKNIGHT RELEASED FROM CUSTODY. MANDATE TO ISSUE FORTHWITH; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

IN THE COURT OF APPEALS OF MARYLAND

No. 50

September Term, 1988

IN RE: MAURICE M.

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,
JJ.

Dissenting opinion by McAuliffe, J., in which Rodowsky, J., joins as to Parts I through IV.

Filed: December 19, 1988

McAuliffe, J., dissenting.

I.

When Maurice M. was three months old he was admitted to Francis Scott Key Medical Center for treatment of a fractured left leg. X-rays disclosed that he had previously suffered fractures of the right humerus, right scapula, and glenoid. Examination disclosed a right arm weakness, possibly attributable to a brachial plexus injury. Hospital birth records showed no indication of birth trauma. Nurses and others observing Maurice's mother at the hospital reported behavior changes, as well as inappropriate conduct toward the child, including shaking him and dropping him into his crib when he was in a spica cast. The Baltimore City Department of Social Services (DSS) was notified of the suspected child abuse and, after investigation, filed a petition with the Circuit Court for Baltimore City, sitting

as the juvenile court (the juvenile court), alleging that Maurice was a child in need of assistance (CINA). The juvenile court promptly ordered continuing shelter care, and granted DSS authority to place Maurice in foster care. Six months later the court found that Maurice was a CINA and placed him under an order of protective supervision with DSS. DSS, acting pursuant to specific authority granted by the juvenile court and pursuant to authority granted it under the order of protective supervision of the child, placed Maurice with his mother under a carefully structured agreement. Among other things, the mother agreed to cooperate with DSS, attend parenting classes, utilize the assistance of a parent aid provided by DSS, and refrain from corporal punishment of the child.

Eight months later, on April 18, 1988, DSS informed the court that the mother had

ceased cooperating with it, had failed to make appropriate use of the parent aide, and had failed to attend parenting classes as required. Additionally, DSS informed the court that Maurice's father had been killed, and that the mother refused to produce the child or tell DSS representatives where he was. DSS feared for the safety of the child because of the above facts, the history of child abuse in the case, the mother's known use of drugs and current threats to kill herself, and the fact that Maurice had last been seen on March 23, 1988, and could not be located by either DSS or the police. Accordingly, DSS asked the court to immediately order the mother to produce the child. The DSS petition and a show cause order were served on the mother, but she did not appear for the scheduled hearing. The court issued an attachment for the person of the mother, and she was taken into custody.

In answer to questions of the court psychiatrist, and in an unsworn statement made in open court, the mother said she had sent Maurice to Texas for a visit with the mother's sister. At the hearing of April 28, the mother refused to produce the child or to inform anyone in authority of his whereabouts. She was thereupon held in contempt and ordered confined in the Baltimore City Jail until she purged the contempt by "either producing the [child] before the court, or revealing to the court[1] his exact whereabouts."

The majority holds that under these circumstances the mother cannot be required to produce the child. I respectfully disagree.

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[1] A later paragraph in the order provided that furnishing information of Maurice's whereabouts to DSS or to the Baltimore City Police Department would also serve to purge the contempt.

II.

The thrust of the juvenile court's order was to require the mother to produce the child. That the order also contained alternative methods by which the mother could purge the civil contempt does not serve to implicate the Fifth Amendment if it is not implicated by the order to produce the child. As the juvenile judge made clear on several occasions, the juvenile court had determined that the child must be returned to shelter care,[2] and the mother was being ordered to produce and surrender the child for that purpose. The other methods of compliance offered by the court provided the mother with alternatives conceivably more convenient for her, but they were in no way compulsory. The mother could have purged,

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[2] As a result of the hearing of April 20, 1988, at which the mother did not appear, and on recommendation of the juvenile master, shelter care was ordered to DSS. No appeal was taken from that order.

and can now purge, the contempt and secure her release by producing, or publicly or privately arranging for the production of, the child. Thus, it is the order to produce the child that is at issue here, and without discussing whether the result would be different if the order contained only a command to divulge the whereabouts of the child, I examine the impact of the Fifth Amendment upon the judicial command to produce the child.

III.

As the majority opinion makes clear, the proper reach of the privilege against compelled self-incrimination extends beyond the spoken word. A person acceding to a court order to produce his records makes a silent statement when he does so: "these are my records, and I have sufficient current control or dominion over them to bring about their production." See Doe v. United States,

487 U.S. ____, 108 S. Ct. 2341, 101 L.Ed.2d 184 (1988) (Doe II); Braswell v. United States, 487 U.S. ____, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988); United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 1243 n. 13, 79 L.Ed.2d 552 (1984) (Doe I); Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L.Ed.2d 889 (1968). By publicly producing a child in response to the court order to produce Maurice, his mother would implicitly represent that: 1) the child produced is Maurice, and 2) she currently has sufficient control and dominion over Maurice to be able to produce him. Each of these implicitly asserted facts might be used against the mother in a criminal prosecution if the physical person of Maurice shows evidence of additional abuse. However, not all testimonial communications rise to a level of Fifth Amendment significance. An implicit assertion that communicates information may,

under the circumstances of a particular case, represent little more than a "foregone conclusion," or may be "self-evident," or "a near truism," and therefore be of "minimal testimonial significance." Fisher v. United States, 425 U.S. 391, 411-12, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1976).[3] In discussing the problem of testimonial assertions implicit in the compelled production of documents, Professors Whitebread and Slobogin have observed:

> The act of producing documents should always be seen as "testimony" concerning the existence and location of the documents, even if only "minimally" so, because it provides information beyond mere identification. Whether the Fifth Amendment can be asserted to bar their production should depend solely upon how incriminating these admissions are. . . . [T]his determination should entail an assessment of the extent to which the facts of existence and location (and, if relevant, authenticity and possession) are "foregone conclusions" which could be proven without using the implied admissions.
> C. Whitebread and C. Slobogin, Criminal Procedure, § 15.06 at 354.

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[3] Compare the earlier language of Albertson v. SACB., 382 U.S. 70, 81, 86 S. Ct. 194, 15 L.Ed.2d 165 (1965), that "[t]he judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation. . . ."

In determining whether the protections of the Fifth Amendment are implicated in the compelled production of this child, it is important to bear in mind that potentially incriminating information may come from two sources. First, there is the information that may be obtained from an examination of the person of the child. That information, which may turn out to be powerfully incriminating if there is evidence of recent abuse, is simply not within the protection of the Fifth Amendment -- it is real and physical evidence and not testimonial evidence. United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973); United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18

L.Ed.2d 1178 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Second, there is testimonial evidence in the form of assertions implicit in the act of production; and it is these assertions, as potentially protected communications, which we must examine in light of the particular facts of this case. The first of these is the identification of the child. Under the facts here present, it is virtually certain that proof of identity exists and can be readily presented by the State without the necessity of any implied voucher by the mother. Putting aside the question of identification by modern scientific comparison techniques, or the probable identification by neighbors or photographs,[4]

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[4] The record discloses that the State possesses at least one photograph of Maurice.

it can hardly be doubted that positive identification could be established by comparison of current and previous x-rays. The number of documented fracture sites in the body of this two-year old child virtually guarantees identification. The potentially incriminating authentication becomes a matter of minimal importance in the context of this case.

The second and final testimonial assertion is that the mother currently has sufficient dominion and control over the child to be able to produce him. This, she says, could incriminate her should there be evidence of recent abuse. Again, I think the potential for incrimination[5] is more

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[5] The child's attorney argues that the mother has it within her power to gain her release without publicly producing Maurice, thereby avoiding the implication of recent control. By arranging to have information of Maurice's whereabouts conveyed anonymously to DSS or to the police, Maurice could be located, and upon Maurice's appearance, the mother would have to be released. Because I prefer to address the question of

theoretical than real, and may not rise to the level of constitutional significance within the meaning of the Fifth Amendment.

The criminal charges reasonably feared in this case are child abuse, and possibly murder or manslaughter. Proof that the mother had actual dominion or control over the child at the time he was produced furnishes no evidence of who had physical custody of the child when criminal acts were committed, or who committed them. Moreover, it is self-evident that the mother had the right of day-to-day control over Maurice from the time he was placed with her by DSS until shelter care was again ordered. Although the establishment of control at the time of production might furnish a fact of assistance in the creation of a permissive inference of continuous control, that is not an essential

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the impact of this testimonial implication head-on, I make no comment on the validity of this argument.

element of proof in the criminal charges which might reasonably be predicted. Additionally, the mother had on at least two occasions freely admitted her continuing control of the child at the very times she was required to produce him. Given these admissions, at least one of which was made through her attorney, it is difficult to see how evidence of control resulting from the production of the child would have much, if any, incriminating value.

IV.

I would not, however, rest the decision in this case upon a determination that the actual incriminatory value of the testimonial assertions implicit in production of the child is so limited as to be outside the protection of the constitutional privilege as a matter of law. Rather, having identified the limited testimonial assertions involved, and having distinguished them from the

potentially powerful but constitutionally unprotected incriminating physical facts that may accompany production, I would weigh the incriminatory value of the implicit assertions against the State's legitimate and nonprosecutorial interest in the welfare of the child to determine whether the assertions rise to the level of constitutional protection. Put another way, in evaluating the true incriminatory weight of the implicit assertions to determine whether they are constitutionally significant, I would consider all relevant circumstances, including the significant societal interest in the welfare of the child.

Factoring the matter of societal interest into the equation for determining whether the testimonial effects of a compelled production shall be deemed to be within the protection of the Fifth Amendment is not a new concept. In Albertson v. SACB.,

382 U.S. 70, 86 S. Ct. 194, 15 L.Ed.2d 165 (1965), the Supreme Court compared the compulsion involved in completing an income tax return as discussed in United States v. Sullivan, 274 U.S. 259, 47 S. Ct. 607, 71 L.Ed. 1037 (1927), with the compulsion involved in filing a registration statement as a member of the Communist Party:

> In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.
> Albertson, 382 U.S. at 79.

The following analysis and parsing of that language of Albertson is instructive:

> This passage announces three inquiries to be made in determining whether a statutory request for information compels incrimination contrary to the respondent's Fifth Amendment rights:
>
> (1) Is the statute directed at a

selective group?

(2) Is that group inherently suspect of criminal activity?

(3) Does the statute deal with an area of the law permeated with criminal statutes? C. Whitebread and C. Slobogin, Criminal Procedure, § 15.05 at 341.

Understandably, the Albertson test has been applied narrowly. See, e.g. Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968); Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968); Marchetti v. United States, supra. In California v. Byers, 402 U.S. 424, 91 S. Ct. 1535, 29 L.Ed.2d 9 (1971), Chief Justice Burger stated in the plurality opinion that:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly. 402 U.S. at 427.

Justice Harlan, concurring in the judgment, and particularly addressing the question of whether a grant of use immunity was required to constitutionally compel the completion and filing of income tax returns, wrote:

> Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute. To hold otherwise would, it seems to me, embark us on uncharted and treacherous seas. There will undoubtedly be other statutory schemes utilizing compelled self-reporting and implicating both permissible state objectives and the values of the Fifth Amendment which will render this determination more difficult to make. 402 U.S. at 458.

More recently, in Braswell v. United States, supra, the Court grappled with the impact of the Fisher - Doe II recognition of potentially protected testimonial assertions in the production of documents upon the earlier line of cases which generally removed documents of collective entities from Fifth

Amendment protection. Recognizing that the act of production by a named officer of the corporation would necessarily produce implicit testimonial assertions of authenticity and control, and that such assertions had some potential to incriminate, the Court weighed a number of factors to determine whether the assertions were entitled to constitutional protection. In deciding that the assertions would be "deemed not to constitute self-incrimination," the Court considered the effect that a contrary decision would have upon the Government's strong interest in prosecuting certain criminal activity:

> We note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute "white-collar crime," one of the most serious problems confronting law enforcement authorities. (footnote omitted).
> Braswell, 108 S.Ct. at 2294.

Applying the teaching of Albertson and its progeny to the facts of this case

persuades me that the statutory requirement of production, rooted as it is in the strongest possible public policy in favor of protecting children, clearly outweighs the limited cost of denying the application of the privilege to the testimonial assertions flowing from the act of production in this case. Section 3-814(c) of the Courts and Judicial Proceedings Article, Maryland Code (1974, 1984 Repl. Vol.), which deals generally with children taken into custody, mandates the production of the child in these words:

> If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.

Although this portion of the statute may constitute no more than a declaration of the implicit or inherent authority of a juvenile court with regard to children who have been

taken into custody and then placed with parents or others during continued court jurisdiction,[6] its existence gives clear notice to those who accept placement of children under such circumstances.

Although § 3-814(c) fairly may be said to be directed at a selective group, i.e., parents, guardians, and custodians who accept placement of juveniles in custody, that group clearly is not "inherently suspect of criminal activity." Nor does the statute deal with an area of the law "permeated with criminal statutes" within the meaning of Albertson and Byers. Certainly, there are criminal statutes dealing with child abuse and with contributing to the delinquency of minors, but the thrust of the juvenile laws of this State is not criminal, but

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6 I need not, and expressly do not, consider whether the legislature intended § 3-814(c) to have a broader reach.

protective. Maurice was taken into custody for his protection. Every effort of the juvenile court and DSS has been to further the best interests of the child and, if possible, to reunite him with his mother. Even in the face of evidence of child abuse, no criminal charges were brought. Viewing the entire history of this case in perspective, it cannot rationally be suggested that the motive of DSS in seeking a court order for the production of Maurice was to gain evidence for use in a criminal prosecution. Make no mistake, if Maurice's condition suggests he has been the victim of additional abuse, the State will no doubt conduct a full investigation, and if warranted, prosecute the offender. But there are two entirely different matters involved here. This is not a case of a request for production that is simply part of a criminal investigation. This is an order for

production issued by the juvenile court as a necessary part of an ongoing child protection case. Criminal prosecution, if it occurs at all, would be entirely collateral to that major objective.

The gist of the Albertson - Byers principle is that a common-sense approach to the application of even the most important constitutional rights is appropriate. In a case like the one before us, where the incriminatory value of the testimonial component of production is, in light of all the circumstances and known facts, slight, and the statutory mandate for production is strong and deeply rooted in important and traditional state interests, it does no violence to the Fifth Amendment to require the mother to produce the child.

V.

As an alternative ground for affirming the action of the juvenile court, I would

hold that the mother waived her right to exercise the privilege as to the testimonial component of production when she assumed custody of the child from the State.

In Braswell, the Court quoted from Justice Brennan's concurring opinion in Fisher that "one in control of the records of an artificial organization undertakes an obligation with respect to those records foreclosing any exercise of his privilege." 108 S.Ct. 2292. The Braswell Court, at 108 S.Ct. 2291 and 2289, also quoted from Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911):

> [B]y virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection. Wilson, 221 U.S. at 382.
>
> * * *
>
> The [State's] reserved power of visitation would seriously be embarrassed, if not

> wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. . . . [T]he visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.
> Id. at 384-85.

If the visitatorial rights of the State with respect to the records of a corporation are sufficiently important to require that a person assuming custody over them does so with knowledge that the State's right of access will overcome the custodian's privilege regarding the act of production, how much greater must the State's rights be with respect to a child over whom it is exercising control? Moreover, the waiver of the right to avoid production, implicit in the case of custodians of collective entity records, was much more explicit here. The State had demonstrated its interest in, and power over, the child by taking him from the

mother and imposing continuing protective custody. The State "placed" the child with the mother, reserving protective supervision and imposing specific conditions on the placement, including the express agreement of full cooperation. I have no hesitancy in concluding that this mother, as would any other person assuming conditional custody of a child from a state under these circumstances, waived her right to claim the privilege as to testimonial assertions implicit in the act of production of the child, and may not now frustrate return of the child to the State's protective custody.

CONCLUSION

I would affirm the judgment of the juvenile court. Although the period of confinement that the State may impose upon the mother for a constructive civil contempt is subject to limitation by the Eighth Amendment's prohibition against cruel and

unusual punishment, and perhaps as well by the Due Process Clauses of the federal and state constitutions, no suggestion has been made that the constitutional limitation has been exceeded in this case.

Judge Rodowsky joins in Parts I through IV of this opinion.

IN THE MATTER	•	IN THE
OF	•	CIRCUIT COURT
MAURICE M	•	FOR
	•	BALTIMORE CITY
	•	DIVISION FOR
	•	JUVENILE CAUSE
	•	PETITION NO.:
	•	88704202

• • • • • • • • • • • •

O R D E R

Upon the petition of the Baltimore City Department of Social Services, JACQUELINE BOUKNIGHT, mother of the infant Respondent, MAURICE M was required to produce him before the court. A hearing was held and after the refusal of Bouknight to present the court with accurate verifiable information as to the whereabouts of said Respondent, it is hereby

ORDERED this 28th day of April, 1988, by the Circuit Court for Baltimore, Division for Juvenile Causes, that:

1. Jacqueline Bouknight, mother of Respondent is found in contempt of the order of this court for failing to produce him before the court or to reveal his exact whereabouts, and

2. Jacqueline Bouknight shall be confined in the custody of the Warden, Baltimore City Jail without bail until such time that she purges herself of contempt by either producing the Respondent before the court or revealing to the court his exact whereabouts, and

3. Jacqueline Bouknight may purge herself at anytime by providing said Respondent or information about him to the Baltimore City Department of Social Services or the Baltimore City Police Department in addition to this court.

/s/
DAVID B. MITCHELL
JUDGE

Copy of Order to:

Marilyn Blimline, Esquire (DSS)
Lisa Mark Watts, Esquire (LAB)
Robin Parsons, Esquire (OPD)

IN THE MATTER OF • IN THE
MAURICE M. • CIRCUIT COURT
• FOR
• BALTIMORE CITY
• DIVISION FOR JUVENILE CAUSES
• PETITION NO.: 88704202

• • • • • • • • • • • •

ORDER TO SHOW CAUSE

Upon consideration of the aforegoing Motion for Contempt and Petition for the Issuance of an Order to Show Cause, it is this 20 day of April, 1988, by the Circuit Court for Baltimore City, Division for Juvenile Causes,

ORDERED that JACQUELINE BOUKNIGHT, Mother of the Respondent infant, show cause at an immediate hearing after apprehension before JUDGE EDWARD J. ANGELETTI, why the relief sought therein should not be granted, provided that a copy of the Motion for Contempt and Petition for the Issuance of an

Order to Show Cause, and this Order be served on JACQUELINE BOUKNIGHT, Mother, as soon as possible.

/s/ Edward J. Angeletti
JUDGE

MATTER OF	•	IN THE
MAURICE M.	•	CIRCUIT COURT
	•	FOR
	•	BALTIMORE CITY
	•	DIVISION FOR JUVENILE CAUSES
	•	88704202

• • • • • • • • • • • • •

ORDER OF PROTECTIVE SUPERVISION

An Adjudicatory Hearing was held in this matter on the 19th day of May, 1987.

A Dispositional Hearing was held in this matter on the 18th day of August, 1987. At that Hearing, this Court found that the Respondent is a Child in Need of Assistance.

The Parties having agreed to the following Disposition, it is this 18th day of August, 1987 by the Circuit Court for Baltimore City, Division for Juvenile Causes,

ORDERED that the Respondent be placed under an Order of Protective Supervision to the Department of Social Services of

Baltimore City (BCDSS) for placement with mother.

IT IS FURTHER ORDERED that:

BCDSS shall submit progress reports every 6 months. Mother shall cooperate with BCDSS. Mother shall continue in therapy until discharged. Mother shall attend center for infant studies at U. of Md. until discharged. Mother shall continue to utilize services of parent aid as provided by BCDSS. Mother shall refrain from physically punishing the respondent.

IT IS FURTHER ORDERED that a Review Hearing shall be held in this matter on N/A.

The Parties by their signatures acknowledge that they each waive any right to note an exception to immediate passage of this Order.

Jacquelyn Boykin, Attorney for DSS

Leonard M. Schwartz, Attorney for Child-

Robin Parsons, Attorney for Parent

And all subject to the further Order of the Court.

RECOMMENDED ON 8/18/87

BY /s/ Joyce J. Mitchell
MASTER

/s/ Kenneth Lavon Johnson
JUDGE

APPROVED AS TO FORM AND CONTENT:

Jacquelyn Boykin
ATTORNEY FOR DEPARTMENT OF
SOCIAL SERVICES OF BALTIMORE CITY

Leonard M. Schwartz
ATTORNEY FOR CHILD

Robin Parsons
ATTORNEY FOR MOTHER

OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1182

88-6051

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Jacqueline Bouknight, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Brief in Opposition to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's Affidavit in support of this Petition is attached hereto.

George E. Burns, Jr.
Assistant Public Defender
Appellate Division
201 St. Paul Place
Baltimore, MD 21202
(301) 333-4842

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1182

BALTIMORE CITY DEPARTMENT OF
SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Jacqueline Bouknight, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in I am unable to pay the costs of said proceeding, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts?

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

(a) If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Jacqueline Bouknight

Subscribed and sworn to before me, a Notary Public this 10 day of February, 1989.

NOTARY PUBLIC

My Commission Expires: July 1, 1990

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefore.

JUSTICE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1182

BALTIMORE CITY DEPARTMENT OF
SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Alan H. Murrell
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ISSUE PRESENTED

Where Respondent is being investigated for the suspected homicide of her child, does the right against self-incrimination bar the juvenile court from incarcerating Respondent to compel her to produce her child or disclose his whereabouts?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1182

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, by her attorneys, George E. Burns, Jr., Jose' Felipe' Anderson, and George M. Lipman, Assistant Public Defenders, requests that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

The basic facts are set forth in the Petition for writ of certiorari and the opinion of the Court of Appeals included in the appendix to the petition. The following facts are set forth by way of amplification.

Pursuant to a finding that Respondent's child, Maurice, was in need of assistance, the Baltimore City Department of Social Services agreed that Maurice should remain in his mother's custody with the following conditions:

> 1. Baltimore City Department of Social Services shall submit progress reports every six months.
>
> 2. Mother shall cooperate with BCDSS.
>
> 3. Mother shall continue in therapy until discharged.
>
> 4. Mother shall attend center for infant studies at University of Maryland until discharged.
>
> 5. Mother shall continue to utilize services of parent aid as provided by BCDSS.
>
> 6. Mother shall refrain from physically punishing the Respondent. (App.46-47).

This order was agreed to on August 18, 1987. Petitioner's supervision following this order was summarized by the Court of Appeals.

> There was evidence that DSS representatives had not seen Maurice since September 4, 1987; that the DSS aide's efforts to see Maurice were thwarted by Jacqueline's statements that the child was not at home; and that Jacqueline had told police that Maurice was in the care of an aunt, but that the aunt had denied seeing Maurice. (Petitioner's Appendix at 19a. n.2).

According to the summary of progress prepared by Petitioner, Petitioner took increased interest in the case in March, 1988. (App.33-34). As a result by April 15, 1988, the following entry appears:

> T/C [telephone call] from Officer Klein at 4 p.m.; Officer Klein to refer case to Homicide to Sgt. Landsmann. (396-2721). Ms. Louise Perry had never seen the baby. Case looks kinky. Officer thinks Ms. Bouknight did something that has hurt Maurice. (App.37).

Similarly, on April 18, 1988, it was noted:

> T/C to Det. James Jones; nothing new on case. Worker suggested photograph of mother and to accompany Det. Jones. Det. Jones stated he would rely on cooperation of Ms. Bouknight. Worker emphasized the possibility of this being a murder case. (App.38).

An entry for April 21, 1988, leaves no doubt that a "homicide" is being investigated.

> T/C to Det. James Jones; Det. Jones advised that case should be regarded as a homicide and that no responsible employee of city or hospital had seen the child. (App.40).

The point was reiterated on April 26, 1988:

> T/C with Dot Rosinski, Chief of PS; Dot Rosinski to contact Youth Division of BCP on morning of 4.27.88 to request that greatest attention be given to the matter as it is a possible homicide. (App.41).

Again on May 4, 1988, it is noted that:

> T/C from Detective James Jones of the Youth Section, Baltimore City Police 396-2042. Detective Jones requesting worker to meet with Detective Richard Falhteich of Homicide Division of Baltimore City Police (9:50 a.m.) 11:00 a.m. - Interview of worker by Detective Richard

> Fahlteich of Homicide, Baltimore City Police at 500 East Baltimore Street, 396-2721. (App.43).

The contempt proceedings themselves also reflect the interrelationship between the contempt action and the homicide investigation. Indeed, the petition seeking contempt states that "this case was referred [to] the Homicide Division for further investigation due to concern over the welfare of the Respondent [Maurice]." (App.48).

At the hearing on April 20, 1988, the hearing judge observed that:

> "The child representative, Ms. Watts, has joined in with the Department of Social Services. Apparently, a decision was made to terminate the foster care relationship even in light of the finding by Dr. Eisenberg that it is not recommended that she regain custody of the child, because it does not appear that she is emotionally capable of providing the protection, nurturance, and care that would be required for the child's safety and security.
>
> So, she is in need of intensive and extensive intervention both on emotional and social levels to help her deal with not only her own internal issues but also those requirements for independent and self-sufficient functioning. What that tells me is we have a lady in severe crisis here. We also possibly have a dead child somewhere which just depresses me to no end, I am not going to kid you.
>
> Since Master Price has recommended the issuance of a warrant, and I have to sign the warrant, I am going to sign the warrant. I'd like to get in touch with somebody in the Police Department to have them go out and take a look into this situation as rapidly as possible. (App.19-20).

The judge was then informed that Petitioner "had a Homicide detective downstairs in Juvenile Court." (App.20).

After the judge had ordered the arrest of Respondent, counsel for Petitioner counseled:

> "Your Honor, if it would be possible too, if the police were sent out, Dr. Eisenberg was concerned that this girl not be treated in any kind of threatening way. He said emotionally, she is functioning at about an eight to ten year old level. So, he feels, especially with the suicide threat she has made, which he thinks we all should take very seriously, he thought the best thing to do was to deal with her as if she were a ten year old child, a very non-threatening kind of approach.
>
> I don't know what happens when the police go out and pick someone up. But if they could be made aware of, if we ever expect to find out what happened with the child, that we're going to have to treat this lady very gently, I think. (emphasis added)(App.21-22).

REASONS FOR DENYING THE WRIT

No matter what else it may be doing, the State is, based on the record in this case, conducting a homicide investigation with Respondent as the chief suspect and her son as the probable victim. As noted by the Supreme Judicial Court of Massachusetts, whatever the exact reach of the right against self-incrimination, an attempt to make a defendant "deliver the corpus delicti" implicates the core of the protection afforded by the right.[1] Commonwealth v.

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[1]Whether respondent is actually guilty of homicide or any other crime is irrelevant.

> At the outset we must condemn the practice of imputing a sinister meaning to

Hughes, 404 N.E.2d 1239 (Mass. 1980), cert. denied, 449 U.S. 900 (1980). See also L. Levy, Origins of the Fifth Amendment 427 (2d ed.1969).[2] The right against self-incrimina-

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> the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' We have reaffirmed our faith in this principle recently in Quinn v. United States, 349 U.S. 155, 99 L.ed.964, 75 S.Ct.668. In Ullman v. United States, 350 U.S.422, 100 L.ed.511, 76 S.Ct.497, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurors. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. Slochower v. Board of Education of New York, 350 U.S. 550, 557-558 (1956).

Faced with suspicious social workers and police, someone in Respondent's position might reasonably "be ensnared by ambiguous circumstances" if, for example, her son were no longer in existence even though through no fault of Respondent.

[2]The Massachusetts Court in Hughes did nothing more than apply the principles of the Fifth Amendment privilege against self incrimination as so aptly noted by Chief Justice Rehnquist in Michigan v. Tucker, 417 U.S. 433, 440 (1974).

> At this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: "No person ... shall be compelled in any criminal case to be witness against himself..." This Court's

tion would mean little if it did not protect a homicide suspect from being forced to be a witness for the State.

Petitioner's claim that this case does not involve "testimonial" evidence and therefore does not implicate the right against self-incrimination is also unavailing. Respondent does not have a duty to incriminate herself. Therefore, it is Petitioner's burden to show that there is a

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> decisions have referred to the right as "the mainstay of our adversary system of criminal justice," Johnson v. New Jersey, supra, at 729, 16 L Ed 2d 882, and as "'one of the great landmarks in man's struggle to make himself civilized.'" Ullman, supra, at 426, 100 L Ed 53 ALR2d 1008. It is not surprising that the constitution of virtually every State has a comparable provision. 8 J. Wigmore, Evidence §2252 (McNaughton rev 1961) (hereinafter Wigmore).
>
> The importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike. The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. See L. Levy, Origins of the Fifth Amendment (1968); Morgan, The Privilege Against Self-Incrimination, 34 Minn L Rev 1 (1949); 8 Wigmore §2250. Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers' desire to protect citizens against such compulsion. As this court has noted, the privilege against self-incrimination "was aimed at a ... far-reaching evil -- a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."

means by which she can both purge her contempt and not incriminate herself. Thus, this Court has noted that, among other things, the right against self-incrimination reflects "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." Murphy v. Waterfront Commission of New York, 378 U.S. 52, 55 (1964). See also Kastigar v. United States, 406 U.S. 441, 444 (1972).

If the child is dead and gone, as the police authorities apparently believe, this is impossible. If Respondent were, for example, to tell her counsel that the child was deceased and missing under suspicious circumstances, the communication would be privileged and not purge the contempt. An anonymous call conveying the same information would also obviously fail to purge the contempt. In sum, there is no way that Respondent can both purge the contempt and avoid a reasonable risk of self-incrimination.

Petitioner's alternative claim is that because a child is involved the Fifth Amendment should be "balanced" out of existence. The starting point for analysis of this claim has been provided by this Court.

> "But claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well." Lefkowitz v. Turley, 414 U.S. 70, 78 (1973).

The reason for this failure is clear.

> "We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need." Lefkowitz v. Cunningham, 431 U.S 801 (1977).

Petitioner's attempt to circumvent these principles rests primarily on a misreading of the plurality opinion in California v. Byers, 402 U.S. 424 (1971). In Byers this Court considered the effect of a California statute requiring that a motorist involved in an automobile accident not leave the scene and supply his name and address.

The plurality first noted that the statute was not aimed at a group particularly suspected of criminal activity. It further noted that the acts required were "neutral" and other purposes to be served were "always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries." Id. at 433.

In the case at bar, a single individual is being investigated for homicide and is being ordered to disclose the whereabouts of the supposed victim. Byers involved a neutral state regulation; this case involves preparation for a prospective homicide prosecution. There is no similarity between the two cases.[3]

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[3]The kindred claim that the juvenile court is powerless unless it can incarcerate Respondent for civil contempt is disingenuous. As noted by the Court of Appeals, the failure to produce the child may constitute a separate statutory crime. (Petitioner's Appendix at 420, n.3). Thus, there are means of enforcing the juvenile court's order without depriving Respondent of her Fifth Amendment rights. See Curcio v. United States, 354 U.S 118 (1957).

Petitioner's waiver arguments are frivolous. At one point Respondent (not under oath) said the child was in Dallas. According to Petitioner, this "statement" "waives" the right against self-incrimination. Reliance is placed on Rogers v. United States, 340 U.S. 367 (1951). In Rogers, a witness freely admitted to her membership in the Communist Party. She refused, however, to name another person who had received Party records. This Court noted that under these circumstances she could not be further incriminated by answering the subsequent questions. This conclusion was not based on waiver.

> Requiring full disclosure of detail after a witness freely testifies as to a criminating fact does not rest upon a further 'waiver' of the privilege against self-incrimination. Admittedly, petitioner had already 'waived' her privilege of silence when she freely answered criminating questions relating to her connection with the Communist Party. But when petitioner was asked to furnish the name of the person to whom she turned over Party records, the court was required to determine, as it must whenever the privilege is claimed, whether the question presented a reasonable danger of further crimination including any previous disclosures. As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination. After petitioner's admission that she held the office of Treasurer of the Communist Party of Denver, disclosure presents no more than a 'mere imaginary possibility' of increasing the danger of prosecution.

Id. at 374-275.

Even ignoring the crucial fact that Respondent never testified, Rogers does not support Petitioner's theory. Merely saying the child is in Dallas does not incriminate Respondent to an extent that there can be no "further crimination" in relation to crimes such as murder, assault and child abuse.

The second aspect of the "waiver" theory is that by accepting custody of the child Respondent "waived" any subsequent claim of self-incrimination. "A waiver is ordinarily an intentional relinquishment or abandonment of known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also Smith v. United States, 337 U.S.137 (1949). The order with its conditions are set forth in the Statement of the Case and contains not a word about self-incrimination. Indeed, if this "agreement" gives notice of a "waiver" of self-incrimination, it equally gives notice of a waiver of the protection against cruel and unusual punishment and the right to free speech. The waiver contentions do not merit consideration by any court, much less this Court.

CONCLUSION

The facts of this case are admittedly interesting. Nevertheless, ignoring Petitioner's hysteria, there is nothing to justify review by this Court. Regrettably, every day there are prosecutions for child abuse and related offenses. However, this unfortunate state of affairs does

not justify abrogating the accused's right not to incriminate herself. Similarly, suspected homicides where the victim cannot be found have long plagued the criminal law, but, once again, the problem is not a basis for depriving suspects of a constitutional protection. Petitioner's rationale for contending that Respondent can be held in contempt is that when the missing victim is a juvenile even the most fundamental constitutional protection must fall. This claim is without historical or analytical support. The petition should be denied.[4]

Respectfully submitted,

George E. Burns, Jr.
Assistant Public Defender

Jose' Felipe' Anderson
Assistant Public Defender

George M. Lipman
Assistant Public Defender

Counsel for Respondent

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[4]The Legal Aid Bureau of Maryland has also filed a petition (in behalf of Maurice) in this case. At pages 18-19 of this petition it is argued, in effect, that Respondent did not properly preserve her federal claim for appellate review. The frivolity of this argument was demonstrated in the Court of Appeals. However, at this stage in the proceedings it is sufficient to note that the argument does not raise a federal question. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." Raley v. Ohio, 360 U.S. 423, 436 (1959). See also Burch v. Louisiana, 441 U.S. 130, 133 n.5 (1979).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February, 1989, three copies of the foregoing Petition were delivered to Ralph Tyler, Assistant Attorney General, Office of the Attorney General, The Munsey Building, 7 North Calvert Street, Baltimore, Maryland 21202 and to Susan Dishler Shubin, Esq., Legal Aid Bureau, Inc., 714 East Pratt Street, 7th Floor, Baltimore, Maryland 21202.

George E. Burns, Jr.
Assistant Public Defender
201 St. Paul Place
Baltimore, Maryland 21202
(301) 333-4842

Attorney for Appellant

APPENDIX

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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

DIVISION FOR JUVENILE CAUSES

IN THE MATTER OF:

MAURICE M_____

Born October 3, 1986 Petition No. 8870427

_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland

April 20, 1988

BEFORE:

HONORABLE EDWARD J. ANGELETTI, Judge

APPEARANCES:

MARILYN E. BLIMLINE, ESQUIRE
Staff Attorney
On behalf of Department of Social Services

LISA WATTS, ESQUIRE
Legal Aid Bureau
On behalf of the Respondent Child

ROBIN PARSONS, ESQUIRE
Assistant Public Defender
On behalf of the Mother

CAROL J. ROBINSON
Official Court Reporter
507 Clarence Mitchell Courthouse
Baltimore, Maryland 21202

PROCEEDINGS

THE COURT: Now, we have this matter from Juvenile Court. Sheriff, keep the door closed. Don't let anyone in the courtroom.

Let the record reflect that the courtroom is empty except for the juvenile clerk and the Juvenile Court personnel involed in the present case.

The matter before the Court is the matter of Maurice M____, Division for Juvenile Causes, Petition Number 88704202. It is a motion by the Department of Social Services for Baltimore City through Ms. Marilyn Blimline, their attorney, for a finding of contempt and for the Issuance of an Order to Show Cause. The Court has carefully read and considered the Motion for Contempt and the Petition for the Issuance of an Order to Show Cause.

Basically, what has happened, the child who is the subject of these proceedings, Maurice M____, was born on October 3, 1986. After investigating reports of physical abuse and having confirmed those reports, the mother of the child, Miss Jacqueline Bouknight -- is she present?

MS. BLIMLINE: No, she is not, Judge.

THE COURT: She had custody of the child taken from her, and the child was placed in foster

care under the Baltimore City Department of Social Services. There were several hearings at the last hearing. Master Mitchell returned the child to his mother pending disposition. That was on July 17 of 1987. A dispositional hearing was held on August 18, 1987, and the child was found to be a Child in Need of Assistance and placed under protective order and placed with the mother.

The mother has failed to comply with any of the requirements of that order, and on April 7, a home visit was made. The petitioner was advised, the petitioner being the Baltimore City Department of Social Services, that the child was in the care of an aunt, but she refused to identify the aunt or provide the whereabouts.

The following day, attempts were made to locate the mother through various relatives, all without success. The Baltimore City Police were contacted on April 2. A Missing Persons report was made. The mother told the investigating officer that an aunt by the name of Louise Perry had the child, and Miss Perry denies this, but she said she didn't see the child, that she didn't see her.

Baltimore City Homicide detectives were contacted, and they are apparently in the process now

of conducting an investigation concerning the welfare of the child. Miss Bouknight had apparently informed Miss Blimline that she intends to kill herself following the hearing today which was scheduled in the Juvenile Court. Does that sum up everything that has occurred?

MS. BLIMLINE: Yes, Your Honor. She made the statement, however, to the social worker, Phil Maguire.

THE COURT: Would all the parties who are present in court identify themselves?

MS. BLIMLINE: Marilyn Blimline representing the Baltimore City Department of Social Services.

MR. WATTS: Lisa Watts, Legal Aid Bureau, representing the Respondent child, Maurice M___ .

THE COURT: May I have your name again?

MS. WATTS: My name is Lisa Watts from the Legal Aid Bureau.

THE COURT: Lisa Watts?

MS. WATTS: Right.

THE COURT: Ms. Watts, you represent the child?

MS. WATTS: That is correct.

THE COURT: All right.

MRS. PARSONS: Robin Parsons, Public Defender's Office, Assistant Public Defender representing the mother whose name is Jacqueline Bouknight.

THE COURT: Can you tell me where the mother is?

MS. PARSONS: Your Honor, I had contact from the mother. She called me a couple of days ago to tell me that Mr. Maguire, the social worker, was going to be filing this Missing Persons report. And she told me at that time that she has been in school and during the time she has been in school, she has left the child with a friend or relative, I can't recall.

She said, "I have to take a day off from school in order to have the child so he can come to see the child, and I have been trying to reach him and have not been able to reach him to come over and see the child." So, I said, "Well, it sounds simple enough. You are off school today. Why don't you just call him and I will call him." But I was unable to reach him. But I said, "We'll both call him and have him come over and see the child, and that would be the end of the matter."

Apparently, that didn't happen. Today I

have spoken with my client. I spoke with her this morning, told her we were going to have the matter heard this afternoon. The problem is, nobody has seen the baby. I said, "We need to see the baby. There is a concern about the baby." I said, "Be here at one o'clock sharp with the baby." And she said she would be here. She is not here.

I have talked with, I guess it is a friend, the number where the mother can be reached, and the friend said she saw the mother with the baby leaving ostensibly for court a little before noon. And she said she saw the baby with the mother. She was quite definite about it. That is the only information I have. The mother is now, it is almost 3 o'clock, and the mother is not here. She had to take the bus, but I don't suspect that is going to take three hours.

MS. BLIMLINE: Your Honor, in regards to the review hearing that was scheduled before Master Teaette Price this afternoon, that was postponed, a bench warrant was issued for the mother, and a shelter care order on Maurice, the Respondent, to the Department of Social Services.

The Department is very concerned, because although Ms. Parsons spoke on the phone with someone

who assured her they saw the baby this morning, we failed to get that persons's name. We don't know who she was talking to.

The social worker, Phillip Maguire, who is present in the courtroom today last saw the child on September 4, 1987. He has been in touch with all of the relatives in Baltimore he can locate and even some out-of-state relatives. And to date, he has not been able to find anyone who has seen the child or who will consistently say they have seen the child any later than, well, one aunt, a maternal aunt said she saw the child and mother on the street in February. Other than that, it seems no one in the family has seen the child since summertime.

So, we're very concerned. This is a very serious abuse case involving a child who at the time was only six months old and involved about three fractures, one being of the femur, which is a pretty difficult bone to break on a six-month-old.

I spoke with the psychologist who examined and evaluated this lady prior to the dispositional hearing --

MS. PARSONS: I am going to object to that. I don't believe that's relevant to the matter today.

THE COURT: Well, I am conducting a hearing to try to find out where Maurice M___ is, and I think it is important that the Court be apprised of any evidence that would tend to shed light on that situation. So, I overrule the objection.

MS. BLIMLINE: Your Honor, I spoke with a doctor who examined and evaluated this lady prior to the dispositional hearing. That was Dr. Joseph Eisenberg. He is very concerned about the safety of the minor child. He is concerned that perhaps the child is now dead or injured so severely that the mother has hidden the child. And I have a copy of his report which was not entered into evidence at the time of the dispositional hearing, but I would like the Court to be aware of it at this time, and I would like this entered.

MS. PARSONS: I object to this. This concerns evidence that could have been presented prior to disposition which was way back in August. It has nothing to do with the present whereabouts of this baby.

MS. BLIMLINE: Your Honor, it couldn't have been presented prior to disposition, because the Department of Social Services did not receive a copy

of this until after the dispositional hearing.

MS. PARSONS: It has nothing to do with the whereabouts of the baby.

THE COURT: If what that doctor says is accurate, Ms. Parsons, then what? Suppose the baby is so seriously injured or dead? What am I supposed to do? Say it is not relevant?

MS. PARSONS: Your Honor, there is no evidence or no indication anything is wrong with the baby.

THE COURT: Where is the baby? Bring me the baby. If I see the baby is okay, fine. I am hapy. But somebody has to protect that child. Based on what I have already heard, this child is in serious jeopardy. Let me hear from Ms. Watts. Let me see that report, please.

MS. WATTS: Your Honor, I would basically be in agreement with Ms. Blimline's position, The fact the mother has not complied with the conditions of the order of protective supervision, the fact that many of the relatives have not seen the baby for quite some time now, and also the report that she is referring to from the doctor which also has concern about mother's ability to care for this child. Additionally, mother was supposed to show up this

afternoon, and she has not appeared.

So, I would support the Department's position, and I do have concerns about the whereabouts of this child.

THE COURT: Ms. Parsons, have you shared the information that you have as to the whereabouts of your client with other counsel?

MS. PARSONS: Yes, and also with Master Price earlier this afternoon.

THE COURT: You did speak with Miss Bouknight today?

MS. PARSONS: Yes.

THE COURT: Are you sure it was Miss Bouknight you spoke with?

MS. PARSONS: Yes.

THE COURT: You have spoken with her on the phone before? You recognize her voice?

MS. PARSONS: Yes. I have been on this case since February 1987. I have spoken with her a number of times, and I am quite sure it was she with whom I was speaking. Also, as I said, I spoke with her several days ago. She called me. She called me several times and left messages. I got back to her, and we spoke about this. And I had no reason to think and still don't have any reason to believe

there is anything wrong. She didn't seem upset or panicked in any way. It sounded as if she were certainly intending to be here on time. She was very clear that she would be here at one o'clock.

THE COURT: She fooled all of us including you, didn't she?

MS. PARSONS: Well, I am not so sure. There may be something that happened along the way that may have prevented her from being here.

THE COURT: Like something happening to this child. How long has it been since you've seen the child?

MS. PARSONS: I have not seen the child since we were last in court.

THE COURT: In September of last year.

MS. PARSONS: But the individual that I spoke with said she had seen the child just a few hours ago with the mother.

THE COURT: Do you know that person?

MS. PARSONS: No.

THE COURT: Did you ever meet that individual in person?

MS. PARSONS: No.

THE COURT: So, you have no way of determining who that person even is.

MS. PARSONS: Well, I could call the number and ask. I have spoken with her not once but about four times today. That's the only way of contacting the mother is through this number she gave me of a friend. And I have spoken with the friend at least four times. I have been calling all day.

THE COURT: Well, that would indicate to this court that you are as concerned about this child as Ms. Blimline and Ms. Watts.

MS. PARSONS: No, Your Honor, I just wanted to be sure that my client appeared and did what she was supposed to so she could continue to have her child in her custody. That is my concern, because obviously, she wants to continue taking care of her child and going to school.

THE COURT: What school is she going to?

MS. PARSONS: I am not sure.

THE COURT: Do you have the name of the school or the type of school?

MS. PARSONS: No, I don't, just that she said she was in school.

THE COURT: She said she was in school. She is how old? 21 and a half? She will be 22 in June?

MS. PARSONS: Right.

THE COURT: You don't have any idea what school she is going to. Has anyone else been able to tell you that?

MS. PARSONS: No.

MS. BLIMLINE: Your Honor, if I could point out too, this mother came through the juvenile system. She has an extensive psychiatric history dating back to the time when she was four years old. I have copies of that. I don't think it is necessary to take up the Court's time to have you read them right now, but she has some serious problems.

Also, the mother herself is not hiding from the Department. The social worker saw her yesterday. But she is refusing to divulge the whereabouts of the child to the worker or to the police or to the Homicide detective who recently became involved.

THE COURT: We'll issue -- who issued a warrant for this lady?

MS. PARSONS: Master Price did about an hour ago.

THE COURT: She submitted that warrant to Judge Mitchell for approval.

MR. NEAL: Michael Neal, Juvenile Court Administrator. Judge Mitchell is on jury duty today.

The warrant is being processed now. I will be bringing the warrant to you for signature.

MS. BLIMLINE: There is also a Missing Persons already out on the baby that has not produced the baby yet and the shelter care to the Department on the infant.

THE COURT: What was the reason that the shelter care was terminated last year?

MS. BLIMLINE: The shelter care expired at the time of disposition.

THE COURT: Why was it permitted to expire? That is what I want to know.

MS. BLIMLINE: On July 17, 1987, when Master Mitchell ordered shelter care in the home of the mother, the Department opposed that at that time. However, an exception was not filed. I can't explain why it was not. I was not the attorney of record. I have no idea. At the time of disposition, I should point out to the Court that the parties entered into a stipulation for order of protective services as opposed to commitment.

So, the parties were in agreement at the time, but keep in mind this is without the benefit of Dr. Eisenberg's psychological evaluation, they were in agreement the child should be home.

The child, in all fairness to the mother, evidently, she has been doing fairly well up until last month when the child's father was killed. Evidently, it was a drug killing. And something has happened to this young mother since that time. People who have seen her think she has not been quite right since the killing.

THE COURT: Ms. Watts, do you have anything further you are offering to the Court?

MS. WATTS: No, I don't, only I recently have acquired this case. I was not the attorney for the child when the case first came in last year. So, I wouldn't know how to answer that.

MS. BLIMLINE: Your Honor, I would also like to ask the Court that if it is possible, when this lady is picked up, if she is ever picked up by the police, that she receive a psychiatric evaluation to in some way judge her ability to provide care for this child now.

THE COURT: Well, Mr. Conti from Medical Services is prsent in the courtroom.

MS. PARSONS: Your Honor, we would be opposed to that. Until the mother is located and until there is some evidence, some reason to believe there is something wrong with her or the baby, or

both, I would oppose any ordering of the psychological or psychiatric.

MS. BLIMLINE: Your Honor, I think there is more than enough reason to suspect that something is wrong. She failed to appear today. Ms. Parsons pointed out to her our concern, many people's concern, that the baby is dead. So, I think she has indicated by her failure to appear there is definitely something wrong. Whether that be with the child's health or welfare or whether that be with her own emotional health, I don't know.

THE COURT: What is the quickest way we can get ahold of this lady physically?

MS. BLIMLINE: I would suggest the police send, that you send the police out to see if you can pick her up at the home where Ms. Parsons contacted her earlier this morning. The social worker has an extensive list of addresses for relatives. I think if the police made a concerted effort to seek her out at all those relatives' homes, I think that would perhaps be a good idea.

I am really concerned about the passage of every day that this child -- I just received this case the day before yesterday. But after speaking with Dr. Eisenberg last night on the phpone, to say

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that he was extremely concerned about the child's wellbeing is putting it very, very mildly. I think we need to do whatever can be done to try to locate the mother and the child.

Your Honor, I also have copies of the medical reports that deal with the child's injuries at the time this first came before the Juvenile Court if you would like to see those.

THE COURT: Can you highlight those injuries for the Court so that Mr. Conti is aware of them, please?

MS. BLIMLINE: I shared these with Mr. Conti earlier yesterday.

THE COURT: Mr. Conti, you are aware of all of this?

MR. CONTI: Quite aware.

THE COURT: Are you aware of Dr. Eisenberg's position dated July 27, that he is concerned about the safety of the child?

MR. CONTI: Yes.

THE COURT: What would your view be of all this, Mr. Conti, based on your knowledge of the circumstances?

MR. CONTI: My belief after reading the material is that if this individual is arrested, she

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is unquestionably in need of urgent evaluation because of the potential possibility of harming herself. When I learned earlier this afternoon that apparently Master Price issued a warrant -- is that correct?

MS. BLIMLINE: Yes, it is.

MR. CONTI: -- I called Baltimore City Jail in fact to be sure she would be handled special if she came in today. I would suggest that if this court takes some other kind of action, that I would leave my private office answering service number so that I may at least be in touch to see that she receives any special handling she might need after her arrest. I see this as an individual in a crisis simply from the paperwork.

MS. PARSONS: Your Honor, I'd like to underscore he has not met my client. He has information he has only read and what Ms. Blimline has told him.

THE COURT: Ms. Parsons, this whole matter could be cleared up if your client comes in and brings the baby in.

MS. PARSONS: I know.

THE COURT: You yourself said that you spoke with her at least four times --

MS. PARSONS: No, with a neighbor, a friend.

THE COURT: With a neighbor or a friend, whoever it is, and she allegedly left her residence to come to court. She was to be here at one o'clock. That was two hours and 40 minutes ago. She has not appeared. You yourself told her according to what you told me that there was concern that the baby was dead. Quite frankly, that concerns the daylights out of of this court.

The child representative, Ms. Watts, has joined in with the Department of Social Services. Apparently, a decision was made to terminate the foster care relationship even in light of the finding by Dr. Eisenberg that it is not recommended that she regain custody of the child, because it does not appear that she is emotionally capable of providing the protection, nurturance, and care that would be required for the child's safety and security.

So, she is in need of intensive and extensive intervention both on emotional and social levels to help her deal constructively with not only her own internal issues but also those requirements for independent and self-sufficient functioning. What that tells me is we have a lady in a severe

crisis here. We also possibly have a dead child somewhere which just depresses me to no end, I am not going to kid you.

Since Master Price has recommended the issuance of a warrant, and I have to sign the warrant, I am going to sign the warrant. I'd like to get in touch with somebody in the Police Department to have them go out and take a look into this situation as rapidly as possible.

MS. BLIMLINE: Your Honor, we had a Homicide detective downstairs in Juvenile Court.

THE COURT: Is he still there?

MS. BLIMLINE: Detective James Jones.

THE COURT: Is he still there?

MS. BLIMLINE: He was there when we came up here. In fact, he said he was coming up.

THE COURT: Could you bring Detective Jones in here, please?

Let me have, if I may, please, Ms. Parsons, the addresses and the phone numbers that you have for Miss Bouknight.

MS. PARSONS: The last address I have is 1829 North Washington Street.

THE COURT: That's near Federal, isn't it?

MS. PARSONS: Zone 13.

THE COURT: That's near Federal. Go ahead.

MS. BLIMLINE: The social worker who just left would probably have the most up-to-date address.

THE COURT: What is the phone number you used to contact the client?

MS. PARSONS: The phone number is 327-8873.

THE COURT: And what is the phone number of the person who claimed to be a friend?

MS. PARSONS: That's it. The only phone number I have for Jacqueline is the phone number, this phone number which is not hers but is that of a friend or relative.

THE COURT: Do you know the name of that person?

MS. PARSONS: No, I don't.

MS. BLIMLINE: Your Honor, if it would be possible too, if the police were sent out, Dr. Eisenberg was concerned that this girl not be treated in any kind of threatening way. He said emotionally, she is functioning at about an eight to ten year old level. So, he feels, especially with the suicide threat she has made, which he thinks we all should take very seriously, he thought the best thing to do

was to deal with her as if she were a ten year old child, a very nonthreatening kind of approach.

I don't know what happens when the police go out and pick someone up. But if they could be made aware of, if we ever expect to find out what happened with the child, that we're going to have to treat this lady very gently, I think.

THE COURT: I had already come to that conclusion, Ms. Blimline. My problem is, I don't know where she is, and I don't know who is going to come in contact with her first and what the reaction she is going to have with that individual is going to be. And we are not picking her up for purposes of punishing her. We are picking her up in an attempt to find the child.

MS. BLIMLINE: But I am not sure she will know that. Ms. Parsons said the last time she called that number, she did inform her a bench warrant had been issued and the police were going to be looking for her.

MS. PARSONS: I did forget to say when I spoke with my client, I explained she had to be here. And she said, "Well, if I come, they just want me to come so they can snatch the child."

I said, "Well, there is no guarantee

they are not going to remove the child from your care if you come to court with the child." I said, "But they want to see the child, and they have an even bigger concern that there is something wrong with the child and that the child could be dead." And she said, "Oh, no." And I said, "Well, we can clear it up by just bringing the child in."

So, that was the conversation. She appeared absolutely horrified when I said that.

MS. BLIMLINE: Of course, she was aware already that was what we were suspecting, because the social worker had contact with her as I explained to you.

MS. PARSONS: I think she may be, if she is deliberately staying away, it is probably because she doesn't want to lose the child. She is afraid, and, of course, that is what is going to happen if she brings the child. The child will be removed.

THE COURT: What this court has to look at is what is in the best interest of this child. And quite frankly, that child is paramount on this court's mind. That child was born on October 3, 1986 which means the child is about 18 months old now, and the child is a baby. Based on all the information before the Court, it is obvious the child is in some

jeopardy because of the actions of the mother in refusing to bring her in. The very fact she has failed to come today tells me after you told her the reason for coming, that something is seriously wrong. And I can't shake that from my mind.

MS. BLIMLINE: The social wowrker also attempted to get in touch with medical clinics around the city to see if she has been bringing the child in for any kind of medical care, and he has not been able to locate one where the child has been seen.

THE COURT: Well, the motion to cite Miss Jacquline Bouknight for contempt is granted.

MS. PARSONS: Your Honor, I am sorry to interrupt, but I will oppose that on the basis that the mother has not been served, and we had not been given notice, neither she nor I. I just received the motion this morning but certainly have not had a reasonable time to prepare a defense. And the rules do require she be served, and certainly that I would have some time to prepare something on her behalf.

THE COURT: Once I bring the mother beefore the Court with the child, you will have all the time in the world. But until that child is safeguarded, I must overrule all of your objections at this time. The child's representative, Ms. Lisa

Watts, has joined in with the Department of Social Services, and in balancing the obligation of the Court to look out for the best interest of the child, I am persuaded the Court's action is appropriate at this time.

I obviously am not going to make a finding of a contempt. I am going to issue a contempt citation against her for failing to appear. She knew she was to be here today. She failed to appear. So, she will be cited for contempt.

I will issue the Order to Show Cause. The bench warrant will be signed by me as soon as it is presented to me. And I would like to have the detectives go out and try to pick her up in as unobtrusive a fashion as possible, keeping in mind that we have to find the child.

If she fails to produce the child, then I will order her held without bail in Baltimore City Jail until the child is found. I don't think I have much choice. If someone can give me some other reasonable alternative, I will be glad to consider it.

Ms. Parsons, you have no other alternative to the Court?

MS. PARSONS: No, I am sorry, I don't.

I've made the efforts I made to get her here. I don't know why she is not here.

THE COURT: Ms. Watts?

MS. WATTS: I really have no other alternative, Your Honor.

THE COURT: Ms. Blimline?

MS. BLIMLINE: I would again request the Court order she have an immediate psychiatric evaluation.

THE COURT: There is little question about that. Mr. Conti has indicated this is a lady in a crisis at this point, and the Court places great weight on Mr. Conti's views in that area. He has indicated he has reviewed the material which I have reviewed, and I am satisfied that his assessment is an accurate assessment, especially superimposing upon that what has happened between Ms. Parsons and her client today. What she has reported today frightens the daylights out of me. She was supposed to be here, and she failed to appear. That tells me something wrong may be going on.

Ms. Parsons, you have received a copy of the Order to Show Cause?

MS. PARSONS: Yes.

THE COURT: You cannot respond to it until

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such time you have actually spoken with your client, I would believe. Would that be accurate?

MS. PARSONS: Yes.

THE COURT: Upon consideration of the Motion for Contempt, Petition for An Issuance of an Order to Show Cause, it is this 20th day of April, 1988 in the Circuit Court for Baltimore City, Division for Juvenile Causes, and the record should reflect this court is designated by Chief Judge Murphy, Court of Appeals, as the alternate Juvenile Court judge of Baltimore City, it is ordered that Jacqueline Bouknight, mother of the Respondent infant, show cause at an immediate hearing as soon as she is apprehended why the relief sought should not be granted, provided that a copy of the Motion for Contempt and Petition for the Issuance of the Order to Show Cause, this order be served on her immediately.

at one o'clock she was to be here, and she is not here. So, we can't serve her. So, what I am going to do is show cause at an immediate hearing. I am going to cross out on your copies, if you look at your copies, on April 20, 1988 at 1:00 p.m., and that you have an immediate hearing after apprehension, with the words to be inserted "before this court,"

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why the relief sought should not be granted, and provided a copy of this order to be served on her immediately or as soon as possible. Cross out "at or before the immediate hearing on this matter" and insert the words "to be served on her as soon as possible." Is that acceptable?

MS. BLIMLINE: Yes, Your Honor.

THE COURT: All right. Good luck. I hope and pray we have some success in getting the warrant from Master Price, and I will ask to see the warrant as well.

MS. BLIMLINE: The worker should be back in a few moments, and he can give the Court other addresses of relatives.

THE COURT: The warrant is being signed by the Court at this time, and there will be no bail on the warrant, because I want this lady brought before me immediately.

(End of proceedings)

REPORTER'S CERTIFICATE

I, Carol J. Robinson, an Official Court Reporter of the Circuit Court of Baltimore City, do hereby certify that I stenographically recorded the proceedings in the mattter of IN THE MATTER OF MAURICE M ___, in the Circuit Court for Baltimore City, Division for Juvenile Causes, Petition No. 88704202, before the Honorable EDWARD J. ANGELETTI, Judge, on April 20, 1988.

I further certify that the page numbers 2 through 28 constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have affixed my signature this 19th day of May, 1988.

Carol J. Robinson

Carol J. Robinson
Official Court Reporter

Mm's X 7
5/18/88

PROGRESS REPORT
CHILD IN PLACEMENT OR COURT ORDERED PROTECTIVE SUPERVISION

Date: May 13, 1988

For Period From: August 18, 1987 to May 5, 1988

Maurice L. M	10/3/86		8-18-87
(Child's Name)	(DOB)	(Docket No.)	(Date of Court Order)

Type of Court Order: Order of Protective Supervision

MOTHER: Jacqueline L. Boulnight
ADDRESS: 1726 N. Washington Street (Presently incarcerated)
TELEPHONE NO.:

FATHER: Terrence M. Miles
ADDRESS: (deceased as of 3/11/88)
TELEPHONE NO.:

1. Reason for placement. When and why child came into care.	Child Protective Service investigation initiated on 1/23/87 substantiated physical abuse and neglect. Maurice had suffered severe physical injuries while in the care of his mother.
2. Present placement. When it began. Adjustment of child.	Maurice was placed in Foster Care from 2/10/87 until 7/17/87. Maurice was ordered returned to the care of his mother by the Court on 7/17/87.
3. Agency contacts since last report. Dates and types of contacts. With whom and where.	See attached contact listings that combines contact by Foster Care, Child Protective Services and In-home Aide Services dating from the dispositional decision on 8-18-87.
4. Health (last medical exam., type of treatment and where, including medication, further needs).	On 7/17/87, Maurice received a medical examination at Chesapeake Health Plan upon his exit from Foster Care. Maurice had some problems with his ear due to teething, and had a cold. A prescription was provided. On 8/30/87, Maurice was seen at Francis Scott Key Emergency Room due to a high temperature. Prescription given. Mother filled prescription on 8/31/87 with assistance of Foster Care worker. No known subsequent medical appointments.

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5. School progress - grade, type of school and adjustment.	NOT APPLICABLE
6. Description of contacts between natural family and child. (Dates, with whom, purpose.)	SEE ATTACHED CONTACT LISTING.
7. Service plan for child's family. (What are the objectives agreed upon between relative and worker and what activities are needed to reach the objective/goal.)	Maurice M__'s current whereabouts are unknown. His mother, Jacqueline Boulnight, has refused to disclose his whereabouts and has been found in contempt of court. Ms. Boulnight has been incarcerated since 4/26/8
8. Financial support by child's parents.	☐ Supporting ☒ Not Support.
AFDC-FC Status	☐ Eligible ☐ Ineligible
9. Other problems and/or comments.	
10. Direction indicated for child.	Every effort is being made by the Baltimore City Police Department and Baltimore City Department of Social Services to locate Maurice Miles. D.S.S. is requesting that Maurice be committed to the Department and placed in Foster Care as soon as he is found.

Prepared By: Phil Maguire Date: 5-13-88
Social Services Center: Child Protective Services Phone No.: 361-2438
Supervisor's Signature: Merle Smith Phone No.: 361-2108
DUE DATE - Next Reconsideration/Court Report: To be determined by the Court

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BOUKNIGHT, Jacqueline

DSS Contacts 8/18/87 through 3/3/88

8/18/87 Disposition Hearing; Child to remain with mother; Order of Protective Supervision; Intake CPS Worker obtains signed consent from Ms. Boukright to obtain written copy of the Psychologist's report; Family and Children's therapist had a copy but could not give such to the Department on 8-18-87.

8/20/87 Foster Care Worker T/C to Lilly Alston, Income Maintenance. She needs a memo explaining what happened at court so that Ms. Boukright can start receiving AFDC.

8/25/87 Foster Care Worker T/C from Mrs. Dixon, In-home Aide. Jackie Boukright is not receiving AFDC yet; In-home Aide H.V. Saw mother and child.

8/31/87 Foster Care Worker T/C to and H.V. with Boukright. Client requested Similac with Iron formula and diapers for Maurice. Maurice had 104° temperature and she took him to the doctor. Transported mother and child to get a prescription. Client requested a new MA card for Maurice; Foster Care Worker T/C and referral to Emergency Services. Took Ms. Boukright to 1500 Greenmount - 2nd floor;

Foster Care Worker T/C to WIC. WIC requested a letter saying that client applied for Emergency Food Assistance, give client some tokens, have her get a letter from the people she is staying with stating that they are providing housing and some food and have her bring these letters to the WIC office Wednesday morning on Eastern Avenue. Took Mother and child to Sears for clothing.

9/1/87 CPS Worker Appointment letter sent to Ms. Boukright at 1726 N. Washington Street.

9/4/87 Foster Care Worker T/C from J. Boukright. Ms. Boukright said she never came to pick up the forms for WIC and tokens because it was too hot. She wanted me to mail it to her. Mrs. Dixon, In-home Aide, comes every Tuesday morning from 8:30-11:30;

9/4/87 CPS Worker H.V. to Ms. Boukright and Maurice; Maurice appeared well-fed with good affect and hygiene. Service agreement discussed and signed by Ms. Boukright.

9/8/87 In-home Aide - H.V. Saw mother and child.

9/13/87 In-home Aide - T/C from J. Boukright stating Aide not needed today.

10/6/87 In-home Aide - T/C from J. Boukright stating Aide not needed today.

10/13/87 In-home Aide - H.V. with mother. Child not there.

11/4/87 In-home Aide - H.V.; Saw mother who said not needed today.

11/4/87 F.C. Worker T/C from client and attempted H.V. Ms. Boukright called and said she had a problem and requested a home visit. She said she knew she had to move in November but she will be moving today as soon as she gets her check. I told her I would be closing her case and that she has a P.S. worker but that I would come out. When I arrived, I was told that her grandfather had just taken her over to Apple's house. He said that he does not like the people she associates with and that one of them stole his T.V. Grandfather's name is John Brown.

BOUKNIGHT, Jacqueline

11/10/87 In-home Aide - unable to keep scheduled home visit with client.

11/17/87 In-home Aide - Attempted H.V. — no one responded.

11/24/87 In-home Aide - Attempted H.V. — no one responded.

11/25/87 CPS Worker - Attempted H.V. - no one responded.

12/1/87 CPS Worker - Sent appointment letter to schedule H.V. on 12/7/87.

12/7/87 Attempted T/C Contact. CPS Worker unable to keep appointment due to emergency in another case.

12/7/87 CPS worker - T/C contact with F.C. Worker; client reportedly has moved.

12/8/87 In-home Aide - Home Visit with mother; child was not there. Client stated she had moved to another residence and would call. Planned to go shopping next week.

12/10/87 In-home Aide - T/C - child answered the phone and said Ms. Boukright had just left.

12/14/87 In-home Aide - T/C with Ms. Boukright. The Aide wanted to schedule a home visit for 12/15/87. Ms. Boukright declined saying she was planning to see Maurice's father. The Aide had gifts for Ms. Boukright and Maurice. Ms. Boukright said she would call and tell her where to bring the gifts.

12/18/87 In-home Aide T/C with Ms. Brown. Was told Ms. Boukright did not live there anymore.

3/22/88 Informed by D.S.S./P.S. worker, Angela Collins (paternal relative) that Terrance Miles, father, has been shot to death on 3/11/88 at Washington and Lanvale Streets. Both parents alleged to be drug abusers. Ms. Boukright reported to be wandering about in a daze since the death of Mr. Miles.

All additional contacts were by CPS Worker.

*12/23/87 Attempted H/V by CPS Worker - no response.

2/5/88 Master File Clearance - attempt to locate new address. Old address still listed.

3/23/88: Emergency HV to Ms. Jacqualine Bouknight at 9 a.m. Ms. Bouknight not home. Worker spoke to former foster father of Ms. Bouknight, Mr. John Brown (DOB 3/3/16, SS#249-14-5253), who indicated that he was the principal tenant of 1726 N. Washington Stree and that Ms. Bouknight and Maurice were in residenc at his home and that he saw Ms. Bouknight and Mauri that morning around 9 a.m. and that both were in good health. Mr. Brown confirmed that Ms. Bouknigh was in a daze after the shooting death of Terrance Miles but that she was better and that he would not permit any harm to come to Maurice and that he had been helping Ms. Bouknight with parenting skills.

3/23/88: T/C to Foster Care Worker, Nancy Weaver; was referral source for Ms. Bouknight to Infant Study Program at U of Md. Hospital. Ms. Bouknight had 3 appointments in July and August, 1987. HA to provi transportation to and from hospital.

3/23/88: T/C to Ella Smith of Medical Records of Francis Sco Key Hospital; last appointment for Maurice 5/22/87, check-up, no special concerns noted. Appointment scheduled 9/9/87, no show.

3/23/88: T/C to U of Md. Hospital Infant Study Program, Director, Ms. Gundy (328-6975 or 828-2485 and 828-2

3/23/88: T/C to Ms. Barbara McGhee, Intake Specialist, U of Md. Infant Study Program (328-2485)

3/23/88: T/C to Ms. Rose Blum, Secretary, Family & Children' Society; no recent contact by Ms. Bouknight. Counselom, Leslie Morris and Carol Hubbard have laf Case closed on 7/31/87.

3/23/88; AMF clearance on Ms. Bouknight; current address for AFDC grant - 1726 N. Washington Street.

3/23/88: AMF clearance on paternal grandmother, Ms. Florence no current 30 case.

3/23/88: AMF clearance on Terrance M. Miles; last home addre 2250 Gable Avenue, SS#214-76-8970, food stamp case 30-635 304, case closed 11/1/87.

3/31/88: T/C to Ms. Jacqueline Bouknight (327-8873); no answ

4/7/88: Unannounced HV to Ms. Bouknight at 1726 N. Washingt Street; Ms. Bouknight stated that she was only visiting 1726 N. Washington Street, but that 1726 N. Washington Street was not her current addre Ms. Bouknight would not disclose her current addres to worker. Ms. Bouknight would not disclose whereal of Maurice to worker, even though informed that worker was responsible to court for Maurice. Ms. Bouknight stated that Maurice is with an aunt, whose name she would not disclose. Ms. Bouknight stated that Maurice was in Baltimore in her care. Ms. Bouknight stated that Maurice was seen at Francis Scott Key Hospital but would not state when.

Ms. Bouknight stated she was seeing another couns but would not disclose her counselor's name or th agency that her counselor was affiliated with.

Ms. Bouknight would not sign service agreement. Ms. Bouknight stated that she didn't care if the court was petitioned as she was not following the provisions of the Order of Protective Supervision. Ms. Bouknight stated that she would get physicall violent if her AFDC grant were suspended in the office of Social Services, as the worker explaine that income could not go out to a child whose whereabouts were unknown. When questioned why sh would not let worker see Maurice or know of his whereabouts, Ms. Bouknight stated, "Social Servic likes snatching people's children." That she was tired of being investigated and that I would neve see them (meaning Ms. Bouknight and Maurice) agai

4/7/88: Conference with PS Unit Head, Leslie Ogungbemi, who concurred with worker's plan to file emergenc court petition and to contact every known relative

4/7/88: Emergency court review petition filed with Legal Resources person, Fran Burns.

4/7/88: T/C to Ms. Edna Gardner of Chesapeake Health Plan at the FSKH; last appointment by Maurice, 5/22/87; appointment scheduled in September, no show. May have been seen at Garwyn Medical Center (330-0 or 330-3484).

4/7/88: Unannounced HV to former address of Terrence Mile at 1623 N. Durham Street; message left; no one hom

4/7/88: T/C to Parent Aide Supervisor, Ms. Gloria Dixon (X2076) to forward parent aide report

4/7/88: Attempted t/c to Parent Aide, Joanne Dix (X2075); message left.

4/7/88: T/C to Garwyn Medical Center (945-2200) at 2300 Garrison Boulevard, Baltimore 21216; Ms. Jani Thomas stated Maurice may have been seen by Dr. Francis or Dr. Clinton or Dr. Eric White (624-7800 or 563-4761) at 3240 Old Town Hall.

4/7/88: T/C to Ms. Kathy Ruzin, of Francis Scott Key Hospi Maurice last seen 8/30/87 for check-up in the ER.

4/7/88: Attempted t/c to Dr. Timothy Doran (330-0967)

4/7/88: Attempted t/c to Dr. Steven Cohan (955-6070)

4/7/88: Attempted t/c to Dr. Patricia Shearer of JHH (342-7

4/7/88: T/C to JHH Social Worker, Rose Cariddi (955-8103); last contact with Maurice in 4/87.

4/7/88: T/C to Ms. Florence Dean (675-2683); last saw Mauri in 9/87. Her son, Terrance Miles, was in North Carolina. Ms. Dean confirmed that her son, Terranc Miles, was shot to death on 3/11/88.

4/8/88: T/C to Parent Aide Supervisor, Gloria Dixon; Ms. Bouknight had been addressed before Thanksgivin Case closed. Parent aide saw Ms. Bouknight in October and November, 1987. Went shopping with Ms. Bouknight. Ms. Bouknight first refused parent

4/8/88: HV to Ms. Lillie Mae Bouknight at 3116 Queensberry Avenue; message left regarding worker's concern about Maurice.

4/8/88: Attempted HV to Andrea Miles at 1430 Montpelier Street (243-8934); no answer; no doorbell or mail bc

4/8/88: T/C to Ms. Florence Dean at 675-2683 and 322-2100; no new information regarding Maurice.

4/8/88: T/C to maternal uncle, Charles Bouknight, at Traveler's Aid (685-3569); Mr. Bouknight had seen Ms. Bouknight recently. Would not disclose information including his own address to worker.

4/8/88: HV to 1307 N. Dallas Street, former address of Mr. Charles Bouknight; worker spoke to a Mr. Lee.

4/8/88: Attempted HV to Ms. Geneva McNeil at 1615 Biddle Str (243-8934); no answer.

4/8/88: Attempted HV to last AMF address for Mr. Miles - 2250 Gable Avenue; no such address.

4/11/88: T/C to Ms. Bouknight; not available; Maurice not with her (327-8873).

4/12/88: T/C to Ms. Bouknight; would not schedule time when worker could see Maurice.

4/12/88: At 4 p.m., worker advised by PS Supervisor, James Mc to file missing person's report with police.

4/12/88: Missing person's report or police report filed with Officer Charles Klein of Eastern District (396-2433) at 4:30 p.m. at 312 E. Oliver Street. Officer to go directly to Ms. Bouknight's address at 1726 N. Washington Street.

4/12/88: T/C to Ms. Lillie Mae Bouknight, paternal grandmothe 3116 Queensberry Avenue (466-4904); Ms. Lillie Mae Bouknight saw Maurice once in 10/86; has had no contact with Ms. Jacqueline Bouknight. No relative that she knew of in North Carolina but in South Carolina. Father, Charles Bouknight, in South Carol Maurice had 2 aunts, but Ms. Lillie Bouknight was certain that Maurice is not in their care.
Ms. Lillie Mae Bouknight believed further that son, Charles Bouknight, had the most information and that he lived on Monument Street, although she did not know his address. Ms. Lillie Mae Bouknight not a relative resource.

4/12/88: T/C to Mr. Charles Bouknight at Traveler's Aid (685-3569); no recent contact with Maurice; would not discuss issue; would call worker at a later date.

4/14/88: T/C to Officer Charles Klein; spoke to paternal grandmother, Ms. Florence Dean, at 1003 N. Gay Street apt. 201 (675-2883 and 322-2100); Terrance Miles reportedly bringing child in March to Jacqueline Bouknight. Ms. Bouknight reportedly to move to North Carolina. Maurice may be in North Carolina. Officer Klein went to 4633 Reisterstown Road to see putative aunt, Louise Perry. Given wrong number by Ms. Bouknight. Ms. Bouknight stated to Officer Klein that she worked at Dial A Mate. Officer did not believe Ms. Bouknight could get a job. Contacted

Dial A Mate at 219 Joppa Road; no listing for Ms. Bouknight. No record at Baltimore C & E. Post Office to get back to Officer Klein regardi another address for Ms. Bouknight.

Officer Klein contacted a Louise Perry at 717 Dr Lake Drive, Apt. 206 (669-4319); no contact with Maurice. Stated that Ms. Bouknight lied.

4/12/88: T/C from Ms. Bouknight at 3:35 p.m. to DSS Screer Worker, Zachary Grant, regarding police visit to home.

4/13/88: T/C from Ms. Bouknight; upset regarding police vi to home. Ms. Bouknight stated Maurice in care of aunt whose name and address she would not disclos Ms. Bouknight stated that she was going to school during the day. Ms. Bouknight would not state a in the evening when the worker could see Maurice.

4/13/88: T/C to Officer Charles Klein at 396-2433; missing person's complaint number is 3D-26458.

4/13/88; OV with PS Unit Chief, Leslie Ogungbemi; worker directed to contact SAO. Letter to IM worker to suspend grant. Letter to Ms. Bouknight, informin of actions taken.

4/14/88: T/C from Officer Klein

4/15/88: T/C to Charles Bouknight at Traveler's Aid (685-3

4/15/88; T/C from Officer Klein at 4 p.m.; Officer Klein t refer case to Homicide to Sgt. Landsmann.(396-272: Ms. Louise Perry had never seen the baby.
Case looks kinky. Officer thinks Ms. Bouknight d something that has hurt Maurice.

4/15/88: 4:20 office conference with PS Supervisor, Gwen J police involvement sufficient. Worker can do no more at this time, including contacting SAO.
Possible relative in Columbia, South Carolina and Wynnboro, South Carolina.

4/15/88: 5:15 t/c to Officer Klein regarding any new inform

4/15/88; T/C to Charles Bouknight (685-3569); Mr. Bouknight stated he would not disclose information but that he would phone worker in his office around 1 p.m. on 4/18/88. Mr. Bouknight had not seen Maurice.

4/17/88: T/C to Officer Klein regarding progress of case

4/18/88: Unannounced HV to Ms. Bouknight at 1726 N. Washing Street at 12 noon; Mr. John Brown stated that he and a Shirley Davis and a Remell Carter lived at 1726 N. Washington Street as well as Ms. Bouknight. Mr. Brown revised his story that he had seen Mauri on 3/23/88, to state that he had last seen Maurice one week previous to 3/23/88.

Mr. Brown stated on occasion, he put Ms. Bouknight out of his home as she allowed Mr. Terrance Miles to come into his home and steal his TV.

4/18/88: 1:30, this worker surprised Ms. Jacqueline Bouknig coming into the home. Ms. Bouknight was in the company of a man. Stated she was enroute to pick up Maurice and to take him to Francis Scott Key Cl to be seen by Dr. Doran and that she would return with Maurice at 4:30 p.m. on 4/18/88 to 1726 N. Washington Street, for the worker to see Maurice. Ms. Bouknight informed of the 4/21/88 1 : court hearing.

4/18/88: T/C to Sgt. Stine of the Youth Division; Sgt. Stin to have police officer meet worker at 1726 N. Wash: Street at 4:30 p.m.

4/18/88: Worker flagged Baltimore City Police Officer Opher, of the Eastern District. Worker and Police Woman went to 1726 N. Washington Street. Only Mr. Brown at home. Mr. Brown stated that Ms. Bouknight but not Maurice had slept at 1726 N. Washington Street on the night of 4/17/88.

4/18/88: Alert submitted to Henry Hunt of Foster Care Intake and to Screening.

4/18/88: AMF clearance for Valerie Miles; no active case.

4/18/88: T/C to Sgt. Stine of Youth Divison (396-2042); case assigned to Det. Jones.

4/18/88: T/C to Charles Bouknight (685-3569) at 10a.m. Mr. Bouknight to call worker at 1 p.m./

4/18/88: Worker waited between 1 and 2 p.m. for phone call f: Mr. Charles Bouknight; no call.

4/18/88: Attempted t/c to Andrea Miles, paternal aunt, who contacted DSS Supervisor, Merle Smith; who indicate: she had not seen Maurice.

4/18/88: T/C to Det. James Jones; nothing new on case. Work: suggested photograph of mother and to accompany Det. Jones. Det. Jones stated he would rely on cooperation of Ms. Bouknight. Worker emphasized the possibility of this being a murder case.

4/19/88: 9 a.m. office visit by Ms. Bouknight. Ms. Bouknight questioned this worker regarding court hearing for 4/20/88. "Are they going to snatch my child?" Worker replied that it was up to court. Ms. Bouknig replied, "that's all I wanted to know." Ms. Bouknig left the office. She then returned asking for token: to go to school. In the waiting room Ms. Bouknight stated, "I'm going to kill myself. Are you going to put that in your record?" Worker replied, yes. Ms. Bouknight stated, "I'm going to kill myself after the court hearing. I won't have any reason to live without him. I won't have any reason to live then." Ms. Bouknight appeared to be on the verge of tears and an emotional breakdown. Worker gave Ms. Bouknight one token.

4/19/88: Case conference with Supervisor, Merle Smith. Worker not obliged to transport Ms. Bouknight to ment: health facility but to inform Ms. Bouknight of such resources.

4/19/88: T/C to Mr. Charles Bouknight, Sr.; M-3, West Columbia Apts.; West Columbia, South Carolina (803)796-2538 at 9:20 a.m. Mr. Bouknight would not discuss Maurice with worker. Stated he did not have Maurice.

4/19/88: T/C to Charles Bouknight,Jr. (685-3569); had not seen child in a long time. Ms. Bouknight did not mention child. Mr. Bouknight believed Ms. Bouknig not capable of caring for child.

4/19/88: T/C to Det. James Jones and OV by Det. Jones.

4/19/88: T/C to Charles Bouknight; address of his father an a Thomasina in North Carolina given to worker. Mr. Bouknight requested that these relatives not be contacted until after the 4/20/88 court hearing Worker stated urgent necessity of safeguarding chi and indicated that they would be contacted immedia

4/20/88: T/C to Mr. Charles Bouknight (803) 796-2538 at 11:: and 12 noon; no answer.

4/20/88: T/C to a Thomasina (803)799-3567; a man named John B. answered; not a relative; didn't know anyth but the person, Thomasina did live at that address.

4/20/88: T/C to Parent Aide Supervisor, Gloria Dixon; messa left.

4/19/88: Unannounced HV to Leslie Miles, paternal aunt, at 913 E. 30th Street; last saw Maurice at the 2000 b of Oliver and Gay Streets, in mid February, 1988.

4/20/88: Telegram sent to Thomasina Bouknight, regarding whereabouts of Maurice Miles. No personal delivery of telegrams for West Columbia or Charles Bouknight Operator #636.

4/20/88: Emergency court review hearing. Shelter care of Maurice granted to DSS by Master Tesette Price. Present - DSS Attorney, Marilyn Blimline; child's attorney, Lisa Watts, Legal Aid attorney for Mauric and Robin Parsons, OPD for Ms. Bouknight. Also present, Det. James Jones of the Youth Division, docket #887042023.

4/20/88: Motion for contempt and petition for the issuance of an order to Show Cause. Court hearing before Judge Edward Angeletti. Present - Marilyn Blimline, Lisa Watts, Robin Parsons, and this worker. Det. Jones not present although informed of court hearing.

Judge Edward Angeletti (396-5074 or 396-5075) issued a Show Cause Order. Ms. Jacqueline Bouknight to answer to the court why she was not present for court hearing of 4/20/88, although had personal service and signed summons and informed by her attorney, Robin Parsons, of the time and place of court hearing.

Judge Angeletti isused a bench warrant for Ms. Bouk and ordered that if Ms. Bouknight failed to produce child, she is to be locked up until she produces child. Warrant #16188. No bail on warrant.

Ms. Bouknight to be brought immediately before Judge Angeletti and be given an immediate psychological and psychiatric evaluation by the court medical officer, Nick Conti.

4/20/88: T/C to Det. James Jones; informed of court order. Det. Jones indicated that he had a copy of the w #161-88. Det. Jones reminded of life and death n of the case.

4/20/88: Alert and copy of Order of Shelter Care given to DSS screening person, Kenny.

4/20/88: Copy of OSC added to the Foster Care Alert to Foster Care Supervisor, Henry Hunt.

4/21/88: T/C and memo to IM Supervisor, Ms. Genevieve Hick (X3282) at Collington Square, to suspend AFDC gra of Ms. Bouknight and to alert her and district regarding Maurice. Copy of memo also sent to IM Worker, Ms. A. Johnson (X3257).

4/21/88: T/C to Sgt. Stine of Youth Division; Det. Jones h spoken to a Sheila Davis at 1729 N. Washington St who stated to Det. Jones that she had seen Mauric with Ms. Bouknight on that day.

4/21/88: T/C to Det. James Jones; Det. Jones advised that case should be regarded as a homicide and that no responsible employee of city or hospital had seen child.

4/21/88: T/C to Sgt. Stine of the Youth Division; Det. Jon looking for Ms. Bouknight at that moment.

4/22/88: 9a.m. t/c to Det. Jones

4/22/88: T/C to court clerk for Judge Angeletti; Eric McDo worker quoted Det. James Jones, "that mother is going to have to help us." Worker suggested some from Judge Angeletti's court to impress upon poli the severity of the case, that Ms. Bouknight, acc to Mr. Brown, did not stay at 1726 N. Washington Street on the night of 4/21/88.

4/22/88: T/C to Det. Jones, who spoke to a Ms. Sophronia Washington, niece of Mr. Brown, at 1726 N. Washin Street, on 4/21/88. Detective did not request photos of mother and child or want worker to accompany him to home as he had never seen Ms.. Bou

4/22/88; T/C to Ms. Cindy Mrozek, clerk to Judge Angeletti; same concern related.

4/22/88; 3 p.m. t/c to Judge Edward Angeletti; Judge Angel suggested that either worker or police wait surreptiously outside the home at 1726 N. Washingt Street.

4/22/88: T/C to PS Supervisor, Merle Smith; Ms. Smith state waiting outside home not a PS worker's function. Worker had done all he could do.

4/22/88: 4:30 unannounced HV to 1726 N. Washington Street; worker spoke with a Norma Begett, age 20, 718 N. Bradford Street, no phone. Stated to this worker

that she had seen Ms. Jacqualine Bouknight around 1:30 p.m. by herself. Ms. Begett had no contact with Maurice.

4/22/88: Unannounced HV to Arthur Haynes at 1729 N. Washin Street regarding Ms. Bouknight and Maurice; Mr. H stated he had not seen Maurice recently.

4/22/88: T/C to Officer Klein regarding Ms. Bouknight; see at 1726 N. Washington Street.

4/25/88: T/C to Det. Jones

4/25/88: T/C from Det. Celio Olivares of the Youth Section to give case close scrutiny..

4/25/88: Attempted t/c to Officer Klein

4/25/88: T/C to Lt. Sweeney of Homicide

4/25/88: T/C to Sgt. Harding, Shift Commander at Eastern D to send an officer to 1726 N. Washington Street a night.

4/25/88: T/C to Ms. Hicks regarding suspension of AFDC mem

4/25/88: T/C from Det. Olivares; in need of photograph of Ms. Bouknight.

4/25/88: T/C to Ms. Hicks of Collington Square; permissibl for police to pick up photo.

4/25/88: T/C from Ms. Hicks; instructed by District Manage Thomas Piscitelli that photo ID of Ms. Bouknight only be issued to worker or DSS personnel.

4/25/88; Visit to Collington Square District to Ms. Hicks; photo given to worker who gave photo to Det. Olivs and Jones.

4/26/88: T/C to Shift Commander, Sgt. Harding; Officer Klei went to 1726 N. Washington Street. Ms. Bouknight there. To have another officer try again on nigh of 4/26/88.

4/26/88: T/C with Dot Rosinski, Chief of PS; Dot Rosinski to contact Youth Divison of BCP on morning of 4/2 to request that greatest attention be given to th matter as it is a possible homicide.

4/27/88: T/C from Lt. Kibler of the Youth Divison (396-204 Ms. Bouknight in police custody. Alert for child. During questioning, Ms. Bouknight mentioned the n of Michelle Jones in Lexington County, South Carol

4/27/88: T/C to Ms. Jeanette Scott, Executive Support Assi Division of Child Protective and Preventive Servi Columbia, South Carolina (803) 734-5670.

Ms. Scott to check out Thomasina Brunson)
2-2 Allen Benedict Court, Columbia, S.C.
(803) 799-3567.
and Charles Bouknight, Sr., M-3 West Columbia,
South Carolina (803) 796-2538 and a Michelle Jones in Lexington County, South Carolina.

4/27/88: 9 p.m. home t/c from DSS attorney, Marilyn Blimlin Court orders of Judge Angeletti not signed. Court hearing to be continued on 4/28/88. Address proff by Ms. Bouknight regarding a Barbara Bouknight. Initially information forwarded to Marilyn Blimlin indicated no such address.

4/27/88: T/C to Sgt. Caprinollo, of the women's lock-up in Central; warned about Ms. Bouknight's suicidal statements. Ms. Bouknight placed in a special ca

4/28/88: Attempted t/c to Ms. Jeanette Scott, DSS in Colum South Carolina (803) 734-6182. Worker spoke to Jeanette Diaz regarding information and investigat request by Baltimore City Police and DSS of the above mentioned addresses as possibilities regardi Maurice's whereabouts.

4/28/88: T/C from PS Worker, Ms. Margaret Hopkins, from the Richland County DSS in Columbia, South Carolina.

On 4/27/88, Ms. Hopkins made a HV to Z-2 Allen Ben Court, home of Mr. and Mrs. Johnny and Thomasina Brunson. Maurice not in their home. Ms. Hopkins also checked medical records at the Richland Memor Hospital and DSS records for both Ms. Bouknight an Maurice Miles for food stamps, AFDC or medical ass No record.

Mr. and Mrs. Brunson knew Mr. Charles Bouknight, S and although they are no relatives, Mr. Charles Bouknight addresses Mrs. Thomasina Brunson as aunt. Mrs. Brunson did not believe that Mr. Bouknight, S was caring for Maurice.

Adress of Ms. Margaret Hopkins - Richland County DS
Child Protective Services
2020 Hampton Street
Columbia, South Carolina 29204
Telephone # (area code 803) 256-4200, X105.

Ms. Hopkins did not have information regarding putative relatives in Lexington County.

4/28/88; T/C to Ms. Janet Diaz, Program Director, Child Protective and Preventive Services (803) 734-5670. Ms. Diaz to contact Ms. Jeanette Scott regarding the two workers sent out on 4/27/88 regarding both addresses.

4/28/88; T/C to Parent Aide Supervisor, Gloria Dixon, and Parent Aide, Joanne Dix; message left.

4/28/88: Interview by Det. Shawn Dashiell of the Youth Sectio at Central District regarding case record information.

4/28/88; Motion for contempt and show cause for non-appearanc on 4/20 and the non-production of child court hearing before Judge David B. Mitchell. Ms. Bouknight found in contempt and to be incarcerated until she purges her contempt by disclosing the whereabouts of her son, Maurice.

Present were DSS attorney, Marilyn Blimline; Legal Ai attorney for Maurice, Lisa Watts; Office of Public Defender attorney, Robin Parsons; Det. Shawn Dashiell of Youth Division, BCP; and Ms. Bouknight.

Also on 4/28/88, Jacqueline Bouknight was given an emergency evaluation for competency and dangerousness. Petition #88704202 by Jonas A. Rappaport, Chief Medical Officer of the Medical Services of the Circuit Court for Baltimore City (396-5013), and it was found by Dr. Rappaport that Ms. Bouknight understands the nature and consequenc of the charges against her and is able to assist her attorney in her defense. It was further stated that Ms. Bouknight is not currently dangerous to herself or the person or property of others. Ms. Bouknight was diagnosed as being a very angry, negativistic type of individual who frequently misunderstands what others are about and easily becomes involved in power struggles.

Ms. Bouknight stated that Maurice is with her siste at 3417 Denton Avenue, Dallas, Texas.

On 4/28/88 Lt. Kibler informed Det. Shawn Dashiell that a Barbara Bouknight did live at that address but that she had never seen Maurice other than a photograph of him when he was first born.

5/4/88 - T/C from Detective James Jones of the Youth Section, Baltimore City Police, 396-2042. Detective Jones requesting worker to meet with Detective Richard Fahlteich of Homicide Division of Baltimore City Police (9:50 a.m.)

5/4/88 - 11:00 a.m. - Interview of worker by Detective Richard Fahlteich of Homicide, Baltimore City Police at 500 East Baltimore Street, 396-2721.

5/5/88 - Detective Dashiell indicates that Charles Bouknight, Sr., M-3 West Columbia Apartments, West Columbia, South Carolina, (AC 803) 796-2438, and that the response was negative that Mr. Bouknight did now know of Maurice's whereabouts. Detective Dashiell indicated that Police were checking out fourteen different individuals with the name of Bouknight in South Carolina.

IN THE MATTER OF : IN THE
MAURICE M___ : CIRCUIT COURT
: FOR
: BALTIMORE CITY
: DIVISION FOR JUVENILE CAUSES
PETITION NO.: 88704202

ORDER TO SHOW CAUSE

Upon consideration of the aforegoing Motion for Contempt and Petition for the Issuance of an Order to Show Cause, it is this 26 day of April, 1988, by the Circuit Court for Baltimore City, Division for Juvenile Causes,

ORDERED that JACQUELINE BOUKNIGHT, Mother of the Respondent infant, show cause at an immediate hearing ~~on April 29, 1988 at 1:00 P.M.~~ after apprehension before JUDGE EDWARD J. ANGELETTI, why th relief sought therein should not be granted, provided that a copy of the Motion for Contempt and Petition for the Issuance of an Order to Show Cause, and this Order be served on JACQUELINE BOUKNIGHT, Mother, ~~at or before the immediate hearing on this matter~~. as soon as possible.

ISI Edward J. Angeletti
JUDGE

A- 0044

MATTER OF * IN THE
MAURICE M____ * CIRCUIT COURT
BORN: OCTOBER 3, 1986 * FOR
* BALTIMORE CITY
* DIVISION FOR JUVENILE CAUSES
* PETITION NUMBER: 88704202

MOTION FOR CONTEMPT AND PETITION FOR THE ISSUANCE OF AN ORDER TO SHOW CAUSE

Pursuant to Rule 910(e) of the Maryland Rules of Procedure, Petitioner, the Department of Social Services of Baltimore City (hereinafter referred to as the BCDSS), by its attorney, MARILYN E. BLIMLINE, petitions this Honorable Court for the Issuance of an Order to show cause against JACQUELINE BOUKNIGHT, and in support of that petition alleges that:

1) On January 23, 1987, the BCDSS received a repor of suspected physical abuse of the Respondent. The BCDSS investigated this report from Dr. TIMOTHY DORAN of the Franci Scott Key Medical Center, and confirmed physical abuse and neglect of the Respondent while in the direct care and supervision of JACQUELINE BOUKNIGHT, the Respondent's mother.

2) On February 10, 1987, BCDSS obtained an Authori tion of Shelter Care to prevent the Respondent from being released from the Francis Scott Key Medical Center to the car of JACQUELINE BOUKNIGHT. On February 11, 1987, a petition wa

A- 0045

filed by BCDSS, alleging the Respondent to be a Child in Need of Assistance. That same day a Shelter Care Hearing was held before Master Joyce Mitchell. Based on allegations of abuse and neglect of the Respondent, the Court issued Orders of Shelter Care on the Respondent for placement in foster care by the BCDSS.

3) On May 19, 1987, an Adjudicatory Hearing was held on the CINA Petition before Master Joyce Mitchell. A separate Dispositional Hearing was scheduled for July 17, 1987, and the Order of Shelter Care to BCDSS was continued until that date.

4) On July 17, 1987, the Dispositional Hearing was postponed pending the completion of a psychological examination of JACQUELINE BOUKNIGHT. The BCDSS' request for continuation of the Order of Shelter Care of the Respondent was denied by Master Joyce Mitchell, and this Respondent was returned to the care of his mother, pending Disposition.

5) A Dispositional Hearing was held on this matter on August 18, 1987, and the Respondent was found to be CINA and was placed under an Order of Protective Supervision to the BCDSS for placement with his mother with the following conditio

A. Progress reports every six months;

B. Mother shall cooperate with BCDSS;

C. Mother shall attend Center for Infant Studies at the University of Maryland until discharged;

D. Mother shall continue to utilize services of parent aide as provided by BCDSS;

E. Mother shall refrain from physically punishing the Respondent

6) The Respondent's mother has failed to cooperate with the BCDSS, in attempts to ensure the safety of the Respon dent in that she has repeateldy failed to inform the Petitione of the Respondent's whereabouts. On March 23, 1988, a home vi was made to verify the safety of the Respondent, however, the Respondent's mother was unable to be contacted. MR. JOHN BROW the former foster father of JACQUELINE BOUKNIGHT, informed the Petitioner that he had seen the Respondent on March 23, 1988, the care of JACQUELINE BOUKNIGHT, and that Ms. Boukright resided in the home.

7) On April 7, 1988, a home visit was made and the Respondent's mother informed the Petitioner that the Responden was in the care of an aunt, however, she refused to identify the aunt or provide the whereabouts of the child.

8) On April 8, 1988, the Petitioner made attempts t locate the Respondent through the following relatives: FLORENC DEAN, the paternal grandmother; ANDREA MILES, the paternal aun LILLIE MAE BOUKNIGHT, the maternal grandmother, CHARLES BOUKNIG JR., the paternal uncle. Each of these relatives report that they had not seen the Respondent for an extended period of ti

9) The Baltimore City Police Department was contact on April 2, 1988, and a Missing Persons Report was filed on th Respondent by the Petitioner. The Respondent's mother mis- informed the investigating officer that the Respondent was in care of an aunt, LOUISE PERRY, however, Ms. Perry denies seein

After repeated attempts to ascertain the whereabouts of the Respondent from JACQUELINE BOUKNIGHT, this case was referred to the Homicide Division for further investigation due to concern over the welfare of the Respondent.

10) JACQUELINE BOUKNIGHT continued to refuse to disclose the whereabouts of the Respondent during a home visit made on April 18, 1988, by the Petitioner, as well as during an office visit made on April 19, 1988, at the BCDSS. Ms. BOUKNIGHT informed the Petitioner that she was going to kill herself, repeating a second time that she would kill herself following the Court hearing on April 20, 1988.

WHEREFORE, the Petitioner respectfully prays that the Court: 1) Issue the accompanying Order, directing Ms. JACQUELINE BOUKNIGHT to show cause why an Order adjudging her to be in comtempt shall not be passed; 2) Find the mother in contempt of Court; 3) Order Ms. JACQUELINE BOUKNIGHT to immediately produce the Respondent to the jurisdiction of the Court; 4) If the mother fails to produce the Respondent at the Adjudicatory Hearing, Order that the mother be found in direct Contempt and take whatever measures the Court feels is appropriate including but not limited to incarceration and/or a fine; 5) Take such other relief as the nature of this cause may require

Marilyn E. Blimline

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Departmental Attorney
Department of Social Services of Baltimore City
Legal Services Division
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 1988, a copy of the foregoing MOTION FOR CONTEMPT & PETITION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE was mailed to the following:

1. Robin Parsons, Esquire
   Public Defender's office
   201 St. Paul Place
   Baltimore, Maryland 21202
   - Attorney for Mother

2. Leonard Schwartz, Esquire
   Legal Aid Bureau
   714 E. Pratt Street
   Baltimore, Maryland 21202
   - Attorney for Respondent

Marilyn E. Blimline

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF ADVOCATES FOR CHILDREN AND YOUTH INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Attorneys for Advocates for Children and Youth Inc.

*Counsel of Record for *Amicus Curiae*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Does the constitutional privilege against giving self-incriminating testimony apply to compelling a mother by court order to produce her previously abused infant child before the court and, if so, has the mother waived any applicable Fifth Amendment privilege?

2. If the constitutional privilege against giving self-incriminating testimony applies to this case, is the mother's Fifth Amendment privilege outweighed by the child's right to protection from further abuse?

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No. 88-1182

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

BRIEF OF ADVOCATES FOR CHILDREN AND YOUTH INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Advocates for Children and Youth Inc. respectfully submits this brief in support of the Petition for Writ of Certiorari to

review the judgment of the Court of Appeals of Maryland.[1]

INTEREST OF AMICUS CURIAE

Advocates for Children and Youth Inc. ("Advocates for Children" or "amicus") is interested in this case because the decision of the Court of Appeals of Maryland severely restricts the power of juvenile courts to protect neglected and abused children.

Amicus is a private, non-profit organization in Maryland that works with the public and private sectors to further the safe and healthy growth of children and families. Advocates for Children has approximately 125 members. Its members include lawyers, social workers, providers of children's services, mental health professionals, representatives from the business community,

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[1] The parties have consented to the filing of this brief. Copies of letters evidencing that consent are on file with the Clerk of this Court.

private citizens, educators, public sector employees, physicians, foundations and coalitions. Advocates for Children seeks to ensure that the courts and public agencies are responsive to children who are in crisis because of child abuse and neglect, substance abuse, teenage pregnancy, leaving school, handicaps, homelessness, and delinquency. Amicus has worked to shorten the time that children spend in foster care, established a "Court Appointed Special Advocate" program for children appearing before the juvenile court, and worked to secure funds for therapeutic nurseries and mental health services for abused and neglected children.

STATEMENT OF THE CASE

Maurice M., who was born on October 3, 1986, is an all too typical example of a neglected and abused child. By three months of age he had suffered serious physical harm of highly suspicious origins, and he had been

hospitalized twice with confirmed multiple fractures. (App. at 16a-18a; 55a-57a.)[2] Thereafter, in 1987, the Baltimore City Juvenile Court adjudicated him to be a Child in Need of Assistance ("CINA"). His mother, respondent Jacqueline Bouknight, did not contest that CINA determination. Following a period of time in foster care away from his mother, in July of 1987, physical custody of Maurice was returned to Ms. Bouknight, subject to the court's jurisdiction and an Order of Protective Supervision to the petitioner Baltimore City Department of Social Services ("DSS"). (App. at 17a-18a.) Under this order, Ms. Bouknight agreed to "cooperate" with DSS. (App. at 18a; 85a-87a.)

[2] Citations in the form "App. at ___" are to the separate Appendix to the petition for certiorari.

Maurice has disappeared, and his mother has refused to cooperate with DSS. She steadfastly refuses to produce Maurice before the Juvenile Court or to tell anyone in authority where he is. Acting on the motion of DSS, the Juvenile Court cited Ms. Bouknight in civil contempt and ordered her incarcerated until she purged herself of contempt either by producing Maurice before the court or by telling someone in authority where he is so that he can be brought before the court. (App. at 18a-21a.) "There is no indication that she is unable to comply in one way or the other." (Rehnquist, C.J., Circuit Justice) (App. at 3a-4a.)

The Court of Appeals of Maryland reversed the Juvenile Court's contempt citation, holding that it violated Ms. Bouknight's Fifth Amendment privilege against self-incrimination, and ordered her immediate release from jail. (App. at 15a-53a.) Two

judges dissented. (App. at 54a-80a.) On the application of DSS, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted a stay of the decision of the Court of Appeals pending the filing and disposition of DSS's Petition for a Writ of Certiorari. (App. at 1a-11a.) That Petition was timely filed on January 18, 1989.

REASONS FOR GRANTING REVIEW

THIS CASE RAISES PROFOUNDLY IMPORTANT AND UNSETTLED ISSUES OF WHETHER A PARENT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, IF APPLICABLE AND NOT WAIVED IN THIS CASE, CAN DENY THE JUDICIARY THE POWER TO PROTECT NEGLECTED AND ABUSED CHILDREN.

Amicus asserts that the Maryland Court of Appeals misapplied a long line of this Court's Fifth Amendment decisions. First, the holding below that the act of complying with a court order to produce a child before the court is "testimony" within the ambit of the Fifth Amendment privilege conflicts with the reasoning of Doe v. United States, 487

U.S. ____, 108 S.Ct. 2341, 2350-52 (1988); Fisher v. United States, 425 U.S. 391, 409 (1976); United States v. Dionisio, 410 U.S. 1, 7 (1973); and Schmerber v. California, 384 U.S. 757, 765 (1966).

Second, on Fifth Amendment grounds, the Court below released Ms. Bouknight from her agreement to cooperate with DSS, notwithstanding this Court's decisions in Curcio v. United States, 354 U.S. 118, 123-24 (1957); Shapiro v. United States, 335 U.S. 1, 16-20 (1948); and Wilson v. United States, 221 U.S. 361, 382, 384-85 (1911). Those cases suggest strongly that the Fifth Amendment does not authorize a mother to void her prior explicit agreement to cooperate with a public agency, particularly when, as here, that agreement was obtained with the assistance of counsel and without which the agency and the court would not have permitted her child to be returned to her. (App. at 18a; 85a-

87a.) All participants in the nation's juvenile court systems, including the parties, lawyers, and judges, need to know whether a parent's commitment to cooperate with the responsible public agency is binding, or whether, as the Court below condoned, that commitment may be subsequently disavowed on constitutional grounds.

This case raises issues never addressed by this Court involving the interplay between judicial power, children's rights and parents' rights. The Court below held that the federal constitutional privilege against self-incrimination denies the state judiciary the power to protect a previously neglected and abused child by requiring the child's mother to produce the child before the court.[3] This Court should review that

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[3] Prior to the decision below, state courts had rejected the absolutist view that a parent's Fifth Amendment claim defeats judicial power to protect a child. See Pet. at

holding since it substantially impairs the Juvenile Court's authority in virtually all child neglect and abuse cases.

A person may claim Fifth Amendment protection if there is "reasonable cause" to fear prosecution. Hoffman v. United States, 341 U.S. 479, 486 (1951). Because this minimal "reasonable cause" threshhold is likely to be met in most civil child neglect and abuse cases,[4] parents of suspected neglected

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26 (citing cases). Thus, there is a conflict between the Maryland court's decision and that of other states on this important issue of federal constitutional law. See Sup. Ct. R. 17.1(b). It is, of course, no solace to a child in Maryland that the rule of federal constitutional law in Maryland, which now bars juvenile courts from providing protection which would be available if the child were in Minnesota, for example, is an anomaly. See In the Matter of the Welfare of J.W. and A.W., 391 N.W.2d 791, 795 (Minn. 1986), cert. denied sub nom., Minor v. Bureau of Social Services, 107 S.Ct. 899 (1987).

[4] This is so because in Maryland, for example, it is a crime punishable by imprisonment of up to 3 years, for an adult to commit "any act, omission, or condition which • • • renders a child • • • in need of assistance." See §3-831, Court and Judicial

or abused children can simply assert the Fifth Amendment, and thereby refuse to produce their children before the court. Thus, the holding below denies the court any power to compel those parents to produce their children before the court. For abused children, the Juvenile Court is the last line of defense. The decision below virtually obliterates that defense and leaves these children at the mercy of their abusers.

The Court below concluded that a "balancing test" to determine the existence of a Fifth Amendment privilege was not appropriate in this case. (App. at 52a - 53a.) That conclusion is wrong and warrants review by this Court. This Court has recognized that it would harm our society to interpret the Fifth Amendment as barring any balancing of an individual's privilege claim

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Proceedings Article, Md. Ann. Code.

against the interests of society at large.[5] Here, Ms. Bouknight's privilege claim should be, indeed must be, balanced against both the general societal commitment and obligation to protect children, see §3-802(a)(1), Courts and Judicial Proceeding Article, Md. Ann. Code, and against Maurice's right to that protection.

What sharply distinguishes this case from the cases relied upon by the Court below, e.g., Commonwealth v. Hughes, 380 Mass. 583, 404 N.E.2d 1239 (1980); United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970) (App. at 36a-39a), is that this case involves protection of a child, and not the production of a potentially incriminating inanimate object (a gun in Hughes and a forged alien registration card in Campos-

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[5] See California v. Byers, 402 U.S. 424 (1971) (plurality opinion); New York v. Quarles, 467 U.S. 649 (1984).

Serrano). It goes without saying that children are qualitatively and constitutionally different from inanimate objects. Because children need judicial protection, the judiciary must be able to balance a parent's Fifth Amendment privilege claim against a child's right to be protected from parental abuse. Furthermore, the balance must be struck, as the Juvenile Court did in this case, in favor of the child.

This Court has spoken eloquently of the rights of children. See In re Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). This case presents an urgent occasion for the Court to do so again. The decision below is wrong as a matter of traditional Fifth Amendment principles and is wrong because it sacrifices the fundamental rights of children. This Court should grant review to correct a dangerous and far-

reaching misreading of the federal Constitution.

CONCLUSION

The Petition should be granted and the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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JOINT

APPENDIX

Nos. 88-1182 and 88-6651

Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

JACQUELINE BOUKNIGHT,
Respondent.

MAURICE M.,
Petitioner,

v.

JACQUELINE BOUKNIGHT,
Respondent.

On Writ Of Certiorari
To The Court of Appeals of Maryland

JOINT APPENDIX

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Petition For Certiorari In No. 88-1182 Filed January 18, 1989
Petition For Certiorari In No. 88-6651 Filed January 23, 1989
Certiorari Granted April 3, 1989

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Order of Supreme Court of the United States (Rehnquist, C.J., Circuit Justice) in *Baltimore City Department of Social Services* v. *Bouknight*, No. A-494, staying judgment of the Court of Appeals of Maryland in Case No. 50 (December 19, 1988) ..... App.Pet.Cert. 12a-13a

Opinion and Order of Supreme Court of the United States (Rehnquist, C.J., Circuit Justice) in *Baltimore City Department of Social Services* v. *Bouknight*, No. A-494, extending stay of judgment of Court of Appeals of Maryland in Case No. 50 (December 21, 1988) ..... App.Pet.Cert. 1a-11a

Docket Entries

Name: Maurice

Docket No.: #88704202

Arraignment
Date: February 11, 1987
Before: Master Briscoe

D.S.S. Counsel: Sharon Wyatt

Mo. Counsel: Robin Parsons

Ch. Counsel: Leonard Schwartz

Court Reporter:
Plea: Shelter care to Baltimore City*

Hearing
Date: May 19, 1987
Before: Master Mitchell
D.S.S. Counsel: Sharon Wyatt
Mo. Counsel: Robin Parsons
Ch. Counsel: Leonard Schwartz
Finding: Stipulation and agreement of all parties—Facts sustained as to allegations—1, 3, & 7—Amend allegations 2, 4, & 6—Facts sustained as to allegations—1,2,3,4,6, & 7—per stipulation—Disposition postponed to July 18, 1987, at 9:00 a.m. before Master Mitchell. Shelter care to***

February 11, 1987—Memo: Subpoena Duces Tecum requesting records from: Frances Scott Key Medical Center, Central Police Records and Johns Hopkins Hospital filed with petition.

*Department of Social Services pending adjudicatory hearing on March 17, 1987, at 9:00 a.m. before Master Mitchell. Mother served. Set for preliminary hearing on March 3, 1987, for the father at 9:00 a.m. before Master Briscoe. All counsel filed appearances.

March 3, 1987—Master Briscoe—Preliminary Hearing—No one appeared. Proceed to adjudicatory hearing set on March 10, 1987, at 9:00 a.m. before Master Mitchell.

March 17, 1987—Master Mitchell—Adjudicatory Hearing—Mother requested postponement. No objections from other attorneys. Postpone and reset for May 19, 1987, at 9:00 a.m. before Master Mitchell. Parties waived right to hearing within 30 days. Mother served. Set for preliminary hearing for father—Terrance Miles, 1632 N. Durham Street 21213, for May 1, 1987, at 9:00 a.m. before*

**Master Mitchell. Issue personal service to father at the above address. Shelter care to Baltimore City Department of Social Services. Attorneys: Robin Parsons, Sharon Wyatt, and Leonard Schwartz

May 1, 1987—Master Mitchell—Preliminary Hearing—Father failed to appear, mother stated he did not live at address given, proceed to adjudicatory hearing set on May 19, 1987, at 9:00 a.m. before Master Mitchell.

***Baltimore City Department of Social Services. Robin Parsons shall arrange for mother's psychological evaluation and provide the court and counsel a copy of the evaluation. Mother served.

July 17, 1897—Master Mitchell—Disposition—Postpone disposition until August 8, 1987, at 9:00 a.m. before Master Mitchell. Order of shelter care with mother, if psychological reveals that the child would be at risk pending this hearing. Child shall be placed in shelter care to Baltimore City Department of Social Services. Psychologist shall determine extent of visits. Mother personally served today.
Attorneys: Jacqueline Boykin, Robin Parsons and Leonard Schwartz

August 18, 1987—Master Mitchell—Disposition—Child In Need of Assistance

****Baltimore City Department of Social Services (BCDSS)—for placement with mother. Conditions: 1)Baltimore City Department of Social Services shall submit progress reports every six (6) months. 2)Mother shall cooperate with Baltimore City Department of Social Services. 3)Mother shall continue in therapy until discharged. 4)Mother shall attend Center for Infant Studies at University of Maryland until discharged. 5)Mother shall continue to utilize services of parent aid as provided by Baltimore City Department of Social Services. 6)Mother shall refrain from physically punishing the respondent. (Leonard Schwartz to prepare the court order).
Attorneys: Robin Parsons, Jacqueline Boykin, and Leonard Schwartz

April 8, 1988—Memo—Filed: Petition for expedited Review of Court Order: Witness List: Certificate of Services: Subpoena Duces Tecum and Witness Summons/Family and Children Society submitted by James Becker, Special Assistant City Solicitor and Marilyn Blimline, Staff Attorney for the Baltimore City Department of Social Services—Respondent' court file forwarded to Master Price.

April 8, 1988—Master Price—Set for Court Review on April 20, 1988, at 1:00 p.m. before Master Price. Issue summons to parties and notice to counsel

April 19, 1988—Memo—Filed: Motion For Contempt and Petition for the Issuance of An Order to Show Cause submitted Attorney—Marilyn Blimline for the *****

*****Baltimore City Department of Social Services.

April 20, 1988—Memo—Respondent's court file forwarded to Master Price. Re: entry dated April 19, 1988.

April 20, 1988—Memo—Filed: Order to Show Cause—Re: Motion and Petition Filed—April 19, 1988. Refer to Mas-

ter Price. Respondent's court file in her hearing room. Re: Review hearing for respondent this afternoon.

April 20, 1988—Master Price—Review of Court Order—Mother failed to appear—was served with child. Shelter care ordered to the Baltimore City Department of Social Services, not to exceed thirty (30) days. Issue Bench Warrant for mother.
Attorneys: Marilyn Blimline, Robin Parsons, and Lisa Watts for Leonard Schwartz

April 20, 1988—Judge Angeletti—Motion for Contempt and Petition for the issurance of an Order to Show Cause Hearing—Motion for Contempt and Show Cause granted—to be served on mother upon apprehension—Bench Warrant for mother, Jacqueline Bouknight signed by the Judge.
Attorneys: Lisa Watts, Marilyn Blimline and Robin Parsons
Court Reporter: Carol Robinson

April 20, 1988—Warrant #161-88—Issued for Jacqueline Bouknight failed to appear for a hearing before Master******

******Price on April 20, 1988.

April 27, 1988—Jacqueline Bouknight—(Parent)—delivered to court on open warrant/warrant recalled—Respondent's court file to Judge Mitchell.

April 27-1988—Judge Mitchell—Miscellaneous Re: Warrant—Remand to Central Police District for processing—Re: Outstanding Warrant issued on April 20, 1988, at 9:00 a.m. before Judge Mitchell—Re: Warrant and Order to Show Cause.
Attorneys: Marilyn Blimline, Andrew Hines, and Lisa Watts
Court Report-Linnie Brown

April 28, 1988—Judge Mitchell—Miscellaneous Re: Warrant to remain open—Remand mother, Jacqueline Bouknight to Baltimore City Jail. Set for Court Review on May 18, 1988, at 9:00 a.m. before Judge Mitchell. Order for Psychiatric Evaluation and Order that Jacqueline Bouknight mother of respondent is found in contempt of the order of this court for failing to produce him before the court or to reveal his exact whereabouts and Jacqueline Bouknight shall be confined in the custody of the Warden, Baltimore City Jail without bail until such time that she purges herself of contempt by either producing the respondent before the court or revealing to the court his exact whereabouts, and Jacqueline Bouknight may purge herself at anytime by providing said respondent or information about him to the Baltimore City Department of Social Services or the Baltimore City Police Department in addition to this court. Orders signed by Judge Mitchell****

*******Court Reporter—Linnie Brown

May 2, 1988—Warrant quashed #161-88—per Judge Mitchell/Warrant with file.

May 10, 1988—Memo—Court file to Judge Mitchell as his request.

May 11, 1988—Judge Mitchell—Set for contempt hearing for mother—Jacqueline Bouknight on May 13, 1988, at 2:00 p.m. before Judge Mitchell. Issue writ to Baltimore City Jail for mother—Jacqueline Bouknight.
Attorneys: Marilyn Blimline, Robin Parsons, and Lisa Watts
Court Reporter—Karen McCue

May 12, 1988—Judge Mitchell—Postponement Court—Cancel Review hearing set for May 13, 1988, at 2:00 p.m. before Judge Mitchell. Court finds no emergency. Proceed to Review of Court Order set for May 18, 1988, at 9:00 a.m. before Judge Mitchell.
Court Reporter—Karen McCue

May 13, 1988—Judge Mitchell—Motion to disclose confidential information—Good cause has been shown to release the photograph, flyers of and identifying information of the respondent by the Baltimore City Police Department for public circulation of any and all photographs, flyers and indentifying information of the respondent child (Maurice M) effective immediately. Baltimore City Police Department to*********

*********release photographs of, and identifying informations on the respondent's natural parents (Terranc Maurice M and Jacqueline Bouknight) also.
Attorneys: Marilyn Blimline, Robin Parsons, Mitchell Merviss for Lisa Watts
Court Reporter—Karen McCue

May 17, 1988—Memo file to postponement court request of Marilyn Blimline.

May 17, 1988—Judge Mitchell—Postponement hearing—Case schedule for review of Court Order on May 18, 1988, at 9:00 a.m. before Judge Mitchell. Baltimore City Department of Social Services Attorney—requested postponement for review hearing because Dr. Eisenberg was not summons. No objection. Postponement denied.
Attorneys: Marilyn Blimline, Robin Parsons and Lisa Watts
Court Reporter—Carol Robinson

May 18, 1988—Judge Mitchell—Review of Court Order/ Contempt Hearing—Contempt order will stand until the Defendant, Jacqueline Bouknight produces the respondent child (Maurice M) The Defendant—Jacqueline Bouknight remanded to Baltimore City Jail—Attorneys to submit memorandum to the court Re: 5th Amendment rights by May 25, 1988. Court has had a camber's conference with attorneys. Court postponed review of court order. Motion hearing will be held on May 26, 1988, at 9:00 a.m. before Judge Mitchell. Attorneys have notice. Shelter care order to the*********

*********Baltimore City Department of Social Services for indefinite period.
Attorneys: Marilyn Blimline, Robin Parsons, George Lipman, Lisa Watts, and Mitchell Merviss.
Court Reporter: Carol Robinson

May 26, 1988—Judge Mitchell—Review of Court Order/ Contempt Hearing Mitchell Merviss, filed appearance as co-counsel for respondent. Contempt for mother, Jacqueline Bouknight, remanded to the Baltimore City Jail until the respondent child, Maurice M is produced.
Attorneys: Marilyn Blimline, Robin Parsons, George Lipman, Lisa Watts and Mitchell Merviss.
Court Reporter: Rachel Petix.

May 26, 1988—Order for Appeal entered to the Court of Special Appeals on behalf of Jacqueline Bouknight, mother of the infant respondent Maurice M., of the Court's findings and orders of contempt in the above captioned case by George Lipman, Assistant Public Defender and Robin Parsons, Assistant Public Defender.

June 3, 1988—Notice of Appearance, entering the appearance as counsel on appeal for appellant, Jacqueline Bouknight, mother of minor child in the above captioned case, filed by Dennis M. Henderson, Chief Attorney, Appellate Division, Office of the Public Defender.

IN THE CIRCUIT COURT FOR
BALTIMORE CITY DIVISION FOR JUVENILE CAUSES

PETITION NO. 88704202

MATTER OF

MAURICE LORENZO M

D.O.B. 10-3-86 AGE 4 ms. SEX M RACE Black

ADDRESS: DSS Facility

MOTHER: Jacqueline Bouknight

ADDRESS: 1726 N. Washington St. 21213

FATHER: Terrance Miles

ADDRESS: 1632 N. Durham St. 21213

PETITION

The State of Maryland respectfully states that the Respondent Child, hereafter Respondent, is a CHILD IN NEED OF ASSISTANCE because the Respondent is mentally handicapped and/or is not receiving ordinary and proper care and attention and the Respondent's parents are unwilling or unable to give the Respondent proper care and attention in that among other things:

1. On January 23, 1987, the Respondent was taken to the Francis Scott Key Medical Center for a swollen leg. Examination by Dr. Timothy Dorian revealed a fracture of the left femur. The Respondent was admitted to the Francis Scott Key Medical Center at that time.

2. On February 4, 1987, skeletal x-rays were taken of the Respondent, which revealed old right humeral, scapular, and glenoid fractures from healed injuries.

3. In November, 1987, the Respondent was hospitalized at Johns Hopkins Hospital for clamydial pneumonia. The

old fractures of the right humeral, scapular and glenoid were medically documented on x-rays taken of the infant at that time.

4. The Respondent's mother stated that the child received his fractured femur, during an altercation she had with an acquaintance. The Respondent's mother states she fell on the child when she was pushed by the acquaintance. She is unable to provide information so that an investigation of the situation can be successfully completed.

5. The Respondent's mother has no explanation for the child's healed fractures.

6. The Respondent's mother has emotional problems, a condition which renders her unable to provide consistently adequate care, protection and supervision of the child. She has been observed shaking the infant and throwing him in the crib, during his hospitalization. She has also been verbally abusive to doctors and a social worker during the investigation of this suspected child abuse.

7. The Respondent's father was recently released from jail. He was incarcerated from June 23, 1986 until January 10, 1987 for cocaine distribution.

WHEREFORE, Petitioner prays that the Court make such findings, including a finding where appropriate, that reasonable efforts were made to prevent placement, and pass such Orders or Decrees as the law provides, including an Order removing the Respondent from the custody of the Respondent's parents, guardian or custodian when in the Respondent's best interest, and placing the Respondent in the custody of the Petitioner, or another appropriate agency or person.

THE PETITIONER FURTHER PRAYS that the Court pass an Order of Shelter Care in this matter to insure the continued protection and care of the Respondent.

WITNESSES: See attached Witness List which is incorporated by reference.

The Department of Social Services of Baltimore City by:

AUTHORIZED BY:
INTAKE CONSULTANT
9346

/s/ Denise Ippolito
PETITIONER
234-2492 PBD-400

Date 2/11/87

The Respondent was placed in Shelter Care on 2-10-87

The Parent(s) were notified of Shelter Care.

FILED: 11 2 87

THE JOHNS HOPKINS UNIVERSITY
SCHOOL OF MEDICINE

ERROL L. BENNETT, M.D.
Assistant Professor

Please address reply to
FRANCIS SCOTT KEY
MEDICAL CENTER
Department of Orthopaedic Surgery
4940 Eastern Avenue
Baltimore, Maryland 21224
(301) 955-0453

March 3, 1987

Ms. Denise Ippolito
Social Worker
Protective Services
312 East Oliver Street
Baltimore, MD 21202

RE: Maurice M.
FSK#: 84-73-51

Dear Ms. Ippolito:

Maurice M was admitted to Francis Scott Key Medical Center on 1/23/87 suffering from a fracture of the left femur. His mother stated that she fell while holding the child and he injured himself in this fashion.

On examination, it was found that he had a left femur fracture shown on x-ray which was treated in skin traction. A physical survey was performed on 2/4/87 revealing fractures in various stages of healing effecting the right humerus, right scapula and glenoid. Films done at the Johns Hopkins Hospital at age 2 months when this child was admitted for pneumonia indicated the presence of these fractures also. There is no evidence of birth trauma in the medical records from the Francis Scott Key Medical Center, and there are reported incidents which occurred while

in the hospital where the mother apparently ill-treated the child while visiting. The child was also noted to have inability to move his right upper extremity, and neurologic consultation was obtained with a view to determine whether or not this was a brachial plexus injury, root avulsion or some form of birth palsy. The patient was referred to Pediatric Neurology at Johns Hopkins Hospital; an appointment is scheduled for 3/9/87.

My concern about Maurice is that it is most unusual for a 3 month old to have long bone fractures, and even more unusual for them to have multiple fractures involving different limbs and the flat bones of the appendicular skeleton as well. The suspicion that this is the result of some form of child abuse is very high and I am concerned that this child may suffer serious or fatal injuries if the conditions leading to this form of abuse are not corrected.

I hope that this will answer your questions. If there is any further information that you may need, please contact me.

Sincerely,

/s/ Errol L. Bennett
Errol L. Bennett, M.D.,
Assistant Chief of Orthopaedics
Francis Scott Key Medical Center

Assistant Professor, Orthopaedic Surgery
Johns Hopkins University, School of Medicine

ELB/mls

FRANCIS SCOTT KEY MEDICAL CENTER
DISCHARGE SUMMARY

NAME: M , MAURICE
NUMBER: 084-73-51
3-month-old black male
second FSKMC admission.
ADMITTED: 1-23-87
DISCHARGED: 2-10-87
SERVICE: PEDIATRICS
ADMITTING: T. DORAN
ATTENDING: T. DORAN

DIAGNOSIS:
Acute left femur fracture, old; right humeral, scapula and glenoid fracture; rule out child abuse.

BRIEF NARRATIVE OF HOSPITAL COURSE: BRIEF HISTORY OF PRESENT ILLNESS:
This is the second FSKMC admission for this 3-month-old black male with a left femur fracture. According to Mom, she and an acquaintance had an altercation on 1-19-87. The acquaintance, Angela Myers, supposedly pushed mother who was holding Maurice. Mom then fell backwards, landing on her left side onto a step. Maurice was in Mom's left arm and hit his left side on the step also. Mom claims Angela is a cocaine user whom she has had fights with in the past. Angela supposedly pushed Mom when she was pregnant, almost causing her to "lose her baby." Mom states Angela wants money which she would not give her leading to this incident. After the fall, Maurice cried, but looked alright according to Mom. She decided not to call the doctor, but to watch the baby. She noticed that he did not move his left leg, but was otherwise normal.

On the morning of admission, Mom states Maurice's left leg appeared puffy, tried to call her regular doctor at Johns Hopkins Hospital and when she couldn't reach this doctor, she brought Maurice to Chesapeake Health Plan.

X-ray was positive for left femur fracture. PS was contacted and the case was reported.

Past hospitalizations: 1986, Francis Scott Key, transferred to Johns Hopkins Hospital for Chlamydial pneumonia. No other illnesses or surgeries, no other known accidents or injuries. Immunizations are up to date, has received one series of DPT, OPV. Regular doctor is Dr. Patricia Shearer at Johns Hopkins Hospital.

Birth: Born at Francis Scott Key, 10-3-86, full term vaginal delivery, weight 8 lbs., 6 oz. without complications. No known birth injury and no injuries in old records. Discharged from the nursery in two days. Is on no medications, takes Similac with iron, no known allergies.

FAMILY HISTORY:
Negative for diabetes, heart disease, high blood pressure, lung diseases, no history of asthma, no history of sickle cell disease, no history of osteogenesis imperfecta. Mom is 20 years old, alive, in good health. Dad is 21, alive and in good health. No other children.

PHYSICAL EXAMINATION:
Temperature is 99.8, pulse 140, respiratory rate 36, weight 4.92 kilograms. General appearance: Well developed, well nourished black male infant in no acute distress. Skin: Cool, dry without lesions or rashes. Left thigh is swollen without discoloration. Fingers are noted to be long. Head: NC, AT, anterior fontanelle soft and flat. Eyes: PERRLA. Ears: TM's not visualized. Nose: No discharge. Throat: Not injected. Neck: Supple, no lymphadenopathy. Lungs are clear. Heart: Regular rate and rhythm without murmur. Abdomen: Soft, bowel sounds present, no hepatosplenomegaly Musculoskeletal: As noted, the left thigh is swollen, held limply by baby, no spontaneous movement, no gross deformity. No other deformities. Neurovascular examination distally to the left thigh is intact. Pulses 2+ and equal bilateral. Neuro examination: Alert and active without focal findings. Bilateral upper arm weakness and decreased tone.

LABORATOTRY DATA:
Left femur is fractured. Hematocrit 27.5.

HOSPITAL COURSE:
The patient was admitted to A5 Center with the diagnosis of left femur fracture initially. Orthopedic consultation was obtained. The baby was placed in skin traction. Neurovascular checks were done distally q.1.h. times 24 hours and q.4.h. PS as mentioned were contacted. While on A5 Center, the patient received portable x-rays, skin traction placement seemed satisfactory based on x-ray results.

Repeat CBC on 1-25-8 showed white blood count of 5.7 with hematocrit of 28.2 and reticulocyte count of 2.4. Urinalysis was negative. The hematocrit was repeated on 2/2/87 due to suspected blood loss. The result was 32.1 with rectic count of 4.6 which was improved.

The patient was seen by Dr. Bennett, pediatric orthopedist, in question to upper arm extremity weakness. Dr. Bennett raised question of brachial plexus injury and suggested neuro consult to be obtained. Dr. Shakra from Neuro, Francis Scott Key, saw patient on 2/5/87 and Dr. Cohen, peds Neuro chief resident from Hopkins, saw patient on 2/8/87. Findings included upper extremity weakness with decreased tone. Differential diagnoses include root avulsion, brachial plexus injury with cord injury. Dr. Cohen's exam showed decreased tone in the arms, proximal worse than distal, right worse than left; also decreased upper extremity movement. He suggested EMG's which were scheduled to be done at Johns Hopkins on 3/9/87 at 1 p.m. and follow up with Pediatric Neurology on 4/1/87 at 2 p.m.

Maurice was placed in a spica cast. On 2/4/87 skeletal survey revealed right humeral, scapular and glenoid fracture as well as old fractures. These fractures were also observed at films done at Johns Hopkins at age two months

when Maurice was admitted for Chlamydia pneumonia. As mentioned, there is no indication of birth trauma during delivery at Francis Scott Key Medical Center. This information was given to DSS by Ms. Callam, the social worker at Francis Scott Key. While on A5 Center nursing staff has noted behavior changes in mother. Another patient's parents on the floor noted incident where mother shook baby while holding him. She was also observed dropping baby into crib with side rails up. This was when he was in his spica cast.

Physical exam while on A5 Center has remained unchanged. The patient is to be discharged to foster care by DSS on 2/10/87. Follow up with Dr. Doran at Chesapeake Health Plan. Also, as mentioned, follow up with Pediatric Neurology, Dr. Cohen at Johns Hopkins and EMG test to be done. A nerve condition study was done while on A5 Center by Dr. Bleecker, results of which are pending. A CT without contrast to rule out occult bleed is to be done on 2/9/87, results pending.

DICTATED BY: /s/ P. Letke PAC for J. Hopkins PAC, P.A.

GLENDA HOPKINS, P.A.

GH:TL6306422
DD: 2-9-87
DT: 2-9-87

Addendum

CT Scan in contrast of the head 2/9/87 revealed no occult bleed; normal CT; ventricles upper limits of normal

D/C Plans

D/C to DSS Custody
Meds: None
F/U: Dr. Doran Chesapeake Health Plan 34-2-7300 2/17/87 3:30 PM
Ortho Clinic FSKMC 2/17/87 1:15 PM for cast removal

Dr. Cohen Peds Neuro: JHH 4/1/87 2:00 PM
EMG 3/9/87 JHH 1:00 PM

Patricia Letke PAC

FRANCIS SCOTT KEY MEDICAL CENTER, INC.
HISTORY AND
PROGRESS NOTES

ADM 084735i-01-004
1242775 TP
M Maurice
10/03/86 M

Admitted 1/23/87

Mother—Jacqueline Bouknight

DATE: 2/3/87
TIME: 8PM

CHP Attending Note

Maurice M is a 3 mo old boy admitted by me 1 hr ago for a fracture of his L femur.

Ms. Bouknight stated to me that she was pushed by a drug-addicted neighbor while Maurice was in her arms, falling upon him. She brought him in for medical care 4 days later at which time he was found to have a fractured femur.

A skeletal survey was subsequently done at which time it was discovered that Maurice had healing fractures of his (R) humerus and (R)scapula & glenoid.

Mrs. Bouknight could offer no explanation for the old fractures, and she has since stated that she has "a bullet with his (my) name on it," to nursery personnel.

Maurice will be placed in traction and will have a SPICA cast placed. He will be followed by orthopedics. There is no need for treating of his old fractures.

/s/ Timothy Doran, M.D.

IN THE CIRCUIT COURT
FOR BALTIMORE CITY
DIVISION FOR JUVENILE CAUSE

DOCKET NUMBER(S): 88704202

RECEIVED MAR 27 1987

AMENDMENT TO PETITION

The Department of Social Services of Baltimore City amends its petition to include the following additional witnesses:

1) Marcia Fuller, Social Worker
   Family & Children's Society
   2502 St. Paul St.
   Balto, Md. 21218
2) Dr. Errol L. Bennett
   Francis Scott Key Medical Center
   Department of Orthopaedic Surgery
   4940 Eastern Ave.
   Balto, Md. 21224
3) Dr. Steven Cohen
   Johns Hopkins Hospital
   600 N. Wolfe St.
   Balto, Md 21205

/s/ J. Michael Keegan
Departmental Attorney
Department of Social Services
of Baltimore City
Legal Services Division
Room 231
1510 Guilford Avenue
Baltimore, Maryland 21202
Telephone: 234-2213

CIRCUIT COURT FOR BALTIMORE CITY
DIVISION FOR JUVENILE CAUSES

STIPULATION

RESPONDENT(S): MAURICE M
PETITION NUMBER(S): 88704202
DATE: 5-19-87

The parties stipulate to the following facts and disposition. The parties also stipulate and agree that these facts render Respondent(s) as Child(ren) in Need of Assistance as defined in Courts Article 3-810 of the MD CODE ANNOTATED and the proposed disposition is in Respondent(s) best interest. The parties further consent to an Order being issued effectuating the proposed disposition.

FACTS:

1. Reasonable efforts required by 42 United States Code Annotated, Section 672 (a) (1) and defined by 42 United States Code Annotated, Section 671 (a) (1-5) have been made.

2. All parties admit to allegation #1, #3, #7

All parties agree to #2 as amended. Add Dr. Dorian has stated that these injuries may have occurred during delivery. All parties agree to allegation #4 as amended to delete the last sentence. All parties agree to allegation #5 as amended to add Dr. Doran pediatrician has stated to counsel for the state that the injury could have occurred during delivery. Dr. Bennett, Orthopediatic Special strongly suspects child abuse.

All parties agree to #6 as amended; to read when Respondent's mother was herself a CINA she had documented emotional problems in 1982 & 1983. She has been observed shaking the infant and throwing him in the crib during his hospitalization. She has also been verbally abusive to doctors and a social worker during the investigation

of this suspected child abuse. She has been in therapy at Family and Children's Society since March 1987 and has been cooperative with her therapist.

DISPOSITION:

1. The Respondent(s') parent(s) shall notify the Court, their attorney(s) and the Department of Social Services of any change in their address.

2. The Court shall sign a Certificate of Hearing.

/s/ CANNOT READ NAME
COUNSEL FOR PETITIONER

/s/ Leonard M. Schwartz
COUNSEL FOR RESPONDENT(S)

/s/ Robin Parsons x Jacqueline Bouknight
COUNSEL FOR MOTHER

APPROVED: JOYCE MITCHELL
MASTER

DATE 5/19/87

JOSEPH M. EISENBERG, PH.D.
PSYCHOLOGIST
204 East Joppa Road
Penthouse Suite 10
Towson, Maryland 21204

James J. Smith, Ph. D. 301-321-9101
Psychology Associate

PSYCHODIAGNOSTIC EVALUATION

Re:	Jacqueline Louise Bouknight
Date of Evaluation:	July 27, 1987
Reason for Referral:	Psychodiagnostic Evaluation
Tests Administered:	Weschler Adult Intelligence Scale—Revised (Prorated) House-Tree-Person Drawing Test Adult Diagnostic Screening Battery Incomplete Sentences Blank Post Drawing Interviews Clinical Interviews

Clinical Observations:

Ms. Bouknight was initially resistant to the Evalation procedures. She did cover her face with her hands and maintained limited eye contact with the examiner.

After some time of prompting and encouragement, she performed all tasks as instructed. There was a need for repeated provision of instructions, since she did not appear to understand the instructions or the questions posed. Consequently, an intellectual assessment was perfomed due to questions about her capacity to function on an intellectual level consistent with her chronological age.

Test Results:

Ms. Bouknight is present functioning in the Borderline range of intelligence for the Verbal area (IQ 72), but she is functioning in the Low Average range of intelligence

in the Performance area (IQ 80). Her overall level of intellectual functioning falls within the Borderline range (Full scale IQ 74).

Her areas of weakness in intellectual functioning are reflected in her general fund of information, understanding of her environment and her capacity to relate on a verbal level and her general expressive and receptive fund of English vocabulary. Her areas of strength are noted in her general understanding of her social environment and her ability to do rote tasks.

Emotionally, Ms. Bouknight is significantly immature and insecure. Her level of functioning is more consistent with an age range of 8 to 10 years than her present age of 21 years. She lacks a clear and insightful understanding of the consequences of her behavior and those activities necessary to maintain a constructive and independent lifestyle.

Her level of trust in social situations is markedly reduced and reflective of someone who does not appear to find satisfaction or comfort in close interpersonal contacts. Her dependency needs do not appear to ever have been met to any significant degree and consequently, her reliance upon her social environment as a source of support is limited.

Her expectations for a parent child relationship are unrealistic. She tends to view her child as a source of fulfillment of basic nurturance needs, hers, rather than see her capacity to fulfill the child's needs. Her level of social understanding is below what would be expected based upon her chronological age, even though it is one of her areas of intellectual strength. The interaction between the effect of early childhood experience and her life long pattern of behavior tend to dillute her overall social effectiveness.

Her background does reflect a good deal of instability and turmoil. It also appears to be the source of confusion

and dissatisfaction over close interpersonal contacts. Much of her resourcefulness is based upon basic survival rather than the development of sophisticated or relatively fluid social skills and abilities.

She tends to have a fickle and volatile set of expectations for her future that reflect her insecurity and inability to establish a realistic view of life. While she wishes to have her basic needs fulfilled through interpersonal contacts, she is often angry when she finds herself with feelings of insecurity and unmet nurturance needs. The consequence to these feelings is that of inappropriate behavior, anger, and a tendency toward acting out.

Her anxiety is relatively high and is often reinforced by the lack of consistency between her wishes for need of fulfillment and actual consequences of her behavior. When she finds her needs not fulfilled, her anxiety increases, but her socially inappropriate behavior also increases.

There are suggestions within the test data that Ms. Bouknight lacks a genuine capacity for relating to the thoughts and feelings of others. She may be so involved within herself that she cannot truly emphasize and appreciate what others may experience, think, and feel.

Summary and Recommendations:

Ms. Bouknight's overall intellectual development falls within the Borderline range of intelligence. She does show significant in her capacity to appreciate the consequences of her behavior, rely upon an internal fund of information for guiding her behavior, and for implenting behavior that is reflective of critical ability to understand the consequences of her actions.

While she does show some relative strength in her capacity to understand her social situation and rely upon rote skills to complete a task, her emotional issues intercede and dillute the capacities to function on an intel-

lectual level that is at least consistent with her overall cognitive endowment.

Her emotional immaturity and less than stable background does not augur well for her capacity to apply herself constructively and in her best interest. She seeks to have her basic needs fulfilled in such an unrealistic way, that she is left with a sense of frustration and a reinforcement of what transpires when you attempt to have close interpersonal contacts: dissatisfaction, unhappiness, and an overall sense of rejection and pain.

She is not now able to relate constructively to her child, since her child is seen as fulfilling her needs rather than the reverse. She becomes totally frustrated and enraged to find herself unable to gain from her child what she wishes as a replacement for what she lacks in her own childhood. When her frustration mounts, she is likely to act out toward the child and see the child as abusive to her rather than herself as abusive to the child.

Even though, Ms. Bouknight may deny extensive abuse in her own background, some tentative findings suggest that she may in fact have been abused but certainly neglected at the very least. The neglect carries with it a lack of capacity for establishment of emphathetic relationships with others and a need to rely upon self for basic survival. These circumstances are not in a constructive pattern and lead toward inappropriate behavior that is directed toward a frustrating agent, e.g. her child.

It is not recommended that Ms. Bouknight regain custody of her child, since she does not appear emotionally capable of providing the adult protection, nurturance, and care that would be required for the child's safety and security. Rather, Ms. Bouknight is need of intensive and extensive intervention both on an emotional and social level to help her deal constructively with not only her own internal issues but also those requirements for independent and self-sufficient functioning. She needs guidance in the

establishment of appropriate limits for herself and others and the means by which she can institute a set of realistic expectations.

These expectations must be oriented toward a constructive view of herself, the world, and what happens when an adult attempts to fulfill her own responsibilities.

The overall approach must be behaviorally oriented and weighted toward "doing" rather than talking about issues. Ms. Bouknight's overall limited intellectual capacity does not lend itself toward a "talking type" therapy but does require behavioral intervention with clearly defined objectives and goals that Ms. Bouknight cannot only understand but appreciate. Further, she also needs to develop a set of reinforcements that she can apply internally and not have to rely upon others.

Her reliance uon others for satisfaction becomes a precursor for frustration and an affirmation of the lack of success and happiness that comes from interpersonal contacts.

/s/ Joseph M. Eisenberg, Ph. D.

CIRCUIT COURT FOR BALTIMORE CITY
DIVISION FOR JUVENILE CAUSES

STIPULATION

RESPONDENT (S): Maurice M

PETITION NUMBER (S): 88704202

DATE: 8-18-87

The parties stipulate to the following facts and disposition. The parties also stipulate and agree that these facts render Respondent(s) as Child(ren) in Need of Assistance as defined in Courts Article 3-810 of the MD CODE ANNOTATED and the proposed disposition is in Respondent(s) best interest. The parties further consent to an Order being issued effectuating the proposed disposition.

FACTS:

1. Reasonable efforts required by 42 United States Code Annotated, Section 672 (a) (1) and defined by 42 United States Code Annotated, Section 671 (a) (1-5) have been made.

2. All parties aware that facts gathered on May 19, 1987 render respondent a child-in-need-of-assistance.

3. Respondent was in Shelter Care from February 11, 987 until July 17, 1987. On July 17, 1987 respondent was returned to the care of his mother subject to the results of psychological evaluation.

4. Mother has been cooperative with BCDSS in attending therapy, evaluation, and accepting the services of BCDSS "parent aid." Mother is also involved and attending the Center for Infant Studies at U. of Md.

Disposition:

1. The Respondent(s') parent(s) shall notify the Court, their attorney(s) and the Department of Social Services of any change in their address.

2. The Court shall sign a Certificate of Hearing.

3. OPS to BCDSS placement with mother.

4. Progress reports every 6 months.

5. Mother shall cooperate with BCDSS.

6. Mother shall continue in therapy until discharged.

7. Mother shall attend Center for Infant Studies at U. of Md. until discharged.

8. Mother shall continue to utilize services of parent aid as provided by BCDSS.

9. Mother shall refrain from physically punishing the respondent.

/s/Jacqueline Boykin
COUNSEL FOR PETITIONER

/s/Leonard M. Schwartz
COUNSEL FOR RESPONDENT(S)

/s/Robin Parsons
COUNSEL FOR MOTHER

APPROVED:

/s/Joyce Mitchell
MASTER

August 18, 1987
DATE

Carol Hubbard LCSW
876-1233, Family and Child Services
22 N. Court St.
Westminster, MD

BOUKNIGHT, JACQUELINE

Hubbard: Jacqueline Bouknight was first seen by this worker on March 12, 1987; I had had several phone conversation with her prior to meeting her. At first contact she presented with significant clinical depressive symptoms, sleep and appetite disturbance, impaired concentration, tearfulness and hopelessness. She cried throughout the first session as she related that her then 9 month old son was in foster care. She had withdrawn from her existing support system and was extremely isolated. Clinician was very concerned about her weight loss and lack of appetite. Jackie agreed in the first session to eat regularly whether she felt like it or not, and to walk for exercise to hopefully improve her sleep and reduce her depression.

She related that her son had been a planned child, and that she would not have more children until/unless she regained custody of Maurice, her son. Additionally, she shared that she had been raised in foster care herself and knew what that was like, wanted better for Maurice. She denied being physically abused in all but one of her foster homes, but clearly articulated her own sense of lack of love and nurturance in a number of her foster homes. Her statement was that most of her foster mothers had been "in it for the money" and were "mean and favored their own children." She was having a hard time coming to terms with Maurice's foster care place-

ment, reported nightmares about this every night.

By the next session on 3/18/87, Jackie had shown considerable progress; she was eating, exercising, and had begun to reach out to some of her friends and family. The difference was immediately striking; she cried less, although we discussed the actual events leading to her son's being taken into custody. She related to worker noting that her son's arm was "moving funny" before Christmas, seeking advice from older relatives and being told that he'd probably slept on it strangely. She reported noticing this after she had left her son in her brother's care to keep an appointment for herself. When the problem did not clear up, as her "consultant" has suggested it should, she reports taking the baby to the doctor on two separate occasions and pointing out the problem with her son's shoulder, and not being satisfied with their examination or advice. At this point, we did some work on assertiveness to assure both her and her child's getting their needs met.

She also related a second incident in which an acquaintance who had been visiting in her grandfather's home, with whom she lives, and whom she subsequently learned was doing drugs, pushed her as she was trying to get her visitor to leave. Jackie admits dropping the baby and falling on him; she also reports checking him out thoroughly afterwards and finding no injuries, also again seeking advice from her relative and friends who have children. When his leg began swelling, however, she immediately took him to the doctor as per her report. It was on this occasion that Protective Services became involved and took custody.

Jackie has been unusually and especially motivated to follow all of DSS recommendations to the letter. She called F&CS (Family and Children's Services) immediately after the Protective Services referral by Ms. Ipoleto and was very eager to get started with counseling. She took immediate action with any suggestion I made to her, followed through and faithfully kept appointments. Likewise, she eagerly engaged in the parenting classes recommended by DSS, learned quite a bit, but was sad when they ended, since she wanted to learn a lot more. She has enrolled in the second part as well. Throughout my working with her, responsible parenting was a major focus. She agreed she had a lot to learn, voluntarily read child-care books, eagerly accepted my imput. We also worked on her taking care of herself, socializing appropriately, where to find support, how to get her needs met, etc. We discussed as well, how to obtain competent and expert advice on child-rearing.

This worker consulted Denise Ipoleto, the Protective Service worker frequently throughout treatment to relate client's progress. Ms. Ipoleto shared information with me that Jackie had been hospitalizaed once in the past with a diagnosis of depression with psychotic features. Jackie related that this had happened after her last foster mother, whom she'd loved as a mother and had a loving, nurturing relationship with, had died. At that time psychological testing was completed; Jackie's I.Q. per Ms. Ipoleto, tested at 65 in the mild mentally retarded range. Based on this client's ability to learn, and her verbal and comprehension ability, this clinician has questions about the validity of those results.

Depression frequently impairs concentration and performance. If Jackie is in fact mildly retarded, she is using her abilities to the maximum; she reads for self-improvement and pleasure, and has clearly demonstrated her ability to learn, cope with stress, and function adequately to this worker.

Jackie was seen on 3-12, 3-18, 3-25, 4-8, 4-15, 4-23, and 4-30-87 by this worker. Break in treatment is due to worker's transfer. Jackie has followed through with request for sessions with this worker's replacement.

IN THE CIRCUIT COURT
FOR BALTIMORE CITY
DIVISION FOR JUVENILE CAUSES

PETITION NUMBER: 88704202

RECEIVED APR 18

MATTER OF
MAURICE M
BORN: OCTOBER 3, 1986

PETITION FOR EXPEDITED REVIEW OF COURT ORDER

The Baltimore City Department of Social Services (hereinafter BCDSS) respectfully represents that:

1. On August 18, 1987, the Respondent was adjudicated a Child in Need of Assistance and was placed under an Order of Protective Supervision to the BCDSS for placement with their mother with the following stipulations:

A. Mother shall cooperate with BCDSS.

B. Mother shall continue in therapy until discharged.

C. Mother shall attend the Center for Infant Studies at University of Maryland until discharged.

D. Mother shall continue to utilize services of Parent Aide as provided by BCDSS.

E. Mother shall refrain from physically punishing the Respondent.

2. The Respondent's mother has failed to cooperate with the BCDSS, as ordered by the Court. She has refused to provide a current address or to inform the petitioner of the whereabouts of the Respondent.

3. The Respondent's mother continues to experience emotional problems, a condition which renders her unable

to provide adequate care, protection and supervision of the Respondent. An evaluation completed on the Respondent's mother by Dr. Joseph M. Eisenberg, Ph.D., states that Ms. Bouknight is "not now able to relate constructively to her child, since her child is seen as fulfilling her needs rather than the reverse. She becomes totally frustrated and enraged to find herself unable to gain from her child what she wishes as a replacement for what she lacks in her own childhood. When her frustration mounts, she is likely to act out toward the child and see the child as abusive to her rather than herself as abusive to the child."

4. The Respondent's mother failed to follow through with attending the Center for Infant Studies at the University of Maryland, as ordered by the Court.

5. The Respondent's mother failed to make appropriate use of Parent Aide Services, as ordered by the Court.

6. The Respondent's father is deceased, as the result of a shooting incident which occurred in March, 1988.

7. The Respondent's mother has a history of drug use, which renders her unable to provide consistently adequate care, protection and supervision of the Respondent.

WHEREFORE, the Petitioner prays that the Court schedule this matter for an expedited review for the purpose of committing the Respondent to the BCDSS for placement in foster care;

FURTHER, that the Court vacate the Current Order of Protective Supervision to the BCDSS for placement of the Respondent in the home of his mother;

And for such other and further relief as the nature of this cause requires.

/s/Phillip Maguire
PHILLIP MAGUIRE
Caseworker
Department of Social Services
of Baltimore City

/s/James S. Becker
Petitioner
JAMES S. BECKER
Special Assistant City Solicitor

/s/Marilyn E. Blimline
MARILYN E. BLIMLINE
Staff Attorney
Department of Social Services of
Baltimore City
Legal Services Division
1510 Guilford Avenue
Baltimore, Maryland 21202
Telephone: 361-2213

IN THE CIRCUIT COURT
FOR BALTIMORE CITY
DIVISION FOR JUVENILE CAUSES

PETITION NUMBER: 88704202

MATTER OF
MAURICE M
BORN: OCTOBER 3, 1986

MOTION FOR CONTEMPT AND PETITION FOR THE ISSUANCE OF AN ORDER TO SHOW CAUSE

Pursuant to Rule 910(e) of the Maryland Rules of Procedure, Petitioner, the Department of Social Services of Baltimore City (hereinafter referred to as the BCDSS), by its attorney, MARILYN E. BLIMLINE, petitions this Honorable Court for the Issuance of an Order to show cause against JACQUELINE BOUKNIGHT, and in support of that petition alleges that:

1) On January 23, 1987, the BCDSS received a report of suspected physical abuse of the Respondent. The BCDSS investigated this report from Dr. TIMOTHY DORAN of the Francis Scott Key Medical Center, and confirmed physical abuse and neglect of the Respondent while in the direct care and supervision of JACQUELINE BOUKNIGHT, the Respondent's mother.

2) On February 10, 1987, BCDSS obtained an Authorization of Shelter Care to prevent the Respondent from being released from the Francis Scott Key Medical Center to the care of JACQUELINE BOUKNIGHT. On February 11, 1987, a petition was filed by BCDSS, alleging the Respondent to be a Child in Need of Assistance. That same day a Shelter Care Hearing was held before Master Joyce Mitchell. Based on allegations of abuse and neglect of the Respondent, the Court issued Orders of Shelter Care on the Respondent for placement in foster care by the BCDSS.

3) On May 19, 1987, an Adjudicatory Hearing was held on the CINA Petition before Master Joyce Mitchell. A separate Dispositional Hearing was scheduled for July 17, 1987, and the Order of Shelter Care to BCDSS was continued until that date.

4) On July 17, 1987, the Dispositional Hearing was postponed pending the completion of a psychological examination of JACQUELINE BOUKNIGHT. The BCDSS' request for continuation of the Order of Shelter Care of the Respondent was denied by Master Joyce Mitchell, and this Respondent was returned to the care of his mother, pending Disposition.

5) A Dispositional Hearing was held on this matter on August 18, 1987, and the Respondent was found to be CINA and was placed under an Order of Protective Supervision to the BCDSS for placement with his mother with the following conditions:

A. Progress reports every six months;

B. Mother shall cooperate with BCDSS;

C. Mother shall attend Center for Infant Studies at the University of Maryland until discharged;

D. Mother shall continue to utilize services of parent aide as provided by BCDSS;

E. Mother shall refrain from physically punishing the Respondent

6) The Respondent's mother has failed to cooperate with the BCDSS, in attempts to ensure the safety of the Respondent in that she has repeatedly failed to inform the Petitioner of the Respondent's whereabouts. On March 23, 1988, a home visit was made to verify the safety of the Respondent, however, the Respondent's mother was unable to be contacted. MR. JOHN BROWN, the former foster father of JACQUELINE BOUKNIGHT, informed the Petitioner that he had seen the Respondent on March 23,

1988, in the care of JACQUELINE BOUKNIGHT, and that Ms. Bouknight resided in the home.

7) On April 7, 1988, a home visit was made and the Respondent's mother informed the Petitioner that the Respondent was in the care of an aunt, however, she refused to identify the aunt or provide the whereabouts of the child.

8) On April 8, 1988, the Petitioner made attempts to locate the Respondent through the following relatives: FLORENCE DEAN, the paternal grandmother; ANDREA MILES, the paternal aunt; LILLIE MAE BOUKNIGHT, the maternal grandmother, CHARLES BOUKNIGHT, JR., the paternal uncle. Each of these relatives report that they had not seen the Respondent for an extended period of time.

9) The Baltimore City Police Department was contacted on April 2, 1988, and a Missing Persons Report was filed on the Respondent by the Petitioner. The Respondent's mother misinformed the investigating officer that the Respondent was in the care of an aunt, LOUISE PERRY, however, Ms. Perry denies seeing the Respondent. After repeated attempts to ascertain the whereabouts of the Respondent from JACQUELINE BOUKNIGHT, this case was referred to the Homicide Division for further investigation due to concern over the welfare of the Respondent.

10) JACQUELINE BOUKNIGHT continued to refuse to disclose the whereabouts of the Respondent during a home visit made on April 18, 1988, by the Petitioner, as well as during an office visit made on April 19, 1988, at the BCDSS. Ms. BOUKNIGHT informed the Petitioner that she was going to kill herself, repeating a second time that she would kill herself following the Court hearing on April 20, 1988.

WHEREFORE, the Petitioner respectfully prays that the Court: 1) Issue the accompanying Order, directing Ms.

JACQUELINE BOUKNIGHT to show cause why an Order adjudging her to be in contempt shall not be passed; 2) Find the mother in contempt of Court; 3) Order Ms. JACQUELINE BOUKNIGHT to immediately produce the Respondent to the jurisdiction of the Court; 4) If the mother fails to produce the Respondent at the Adjudicatory Hearing, Order that the mother be found in direct Contempt and take whatever measures the Court feels is appropriate including but not limited to incarceration and/or a fine; 5)Take such other relief as the nature of this cause may require.

/s/Marilyn E. Blimline
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Circuit Court for Baltimore City

April 20, 1988
[Title omitted in printing]

PROCEEDINGS

[2] THE COURT: Now, we have this matter from Juvenile Court. Sheriff, keep the door closed. Don't let anyone in the courtroom.

Let the record reflect that the courtroom is empty except for the juvenile clerk and the Juvenile Court personnel involed in the present case.

The matter before the Court is the matter of Maurice M , Division for Juvenile Causes, Petition Number 88704202. It is a motion by the Department of Social Services for Baltimore City through Ms. Marilyn Blimline, their attorney, for a finding of contempt and for the Issuance of an Order to Show Cause. The Court has carefully read and considered the Motion for Contempt and the Petition for the Issuance of an Order to Show Cause.

Basically, what has happened, the child who is the subject of these proceedings, Maurice M , was born on October 3, 1986. After investigating reports of physical abuse and having confirmed these reports, the mother of the child, Miss Jacqueline Bouknight—is she present?

MS. BLIMLINE: No, she is not, Judge.

THE COURT: She had custody of the child taken from her, and the child was placed in foster [3] care under the Baltimore City Department of Social Services. There were several hearings at the last hearing. Master Mitchell returned the child to his mother pending disposition. That was on July 17 of 1987. A dispositional hearing was held on August 18, 1987, and the child was found to be a Child in Need of Assistance and placed under protective order and placed with the mother.

The mother has failed to comply with any of the requirements of that order, and on April 7, a home visit was made. The petitioner was advised, the petitioner being the Baltimore City Department of Social Services, that the child was in the care of an aunt, but she refused to identify the aunt or provide the whereabouts.

The following day, attempts were made to locate the mother through various relatives, all without success. The Baltimore City Police were contacted on April 2. A Missing Persons report was made. The mother told the investigating officer that an aunt by the name of Louise Perry had the child, and Miss Perry denies this, but she said she didn't see the child, that she didn't see her.

Baltimore City Homocide detectives were contacted, and they are apparently in the process now [4] of conducting an investigation concerning the welfare of the child. Miss Bouknight had apparently informed Miss Blimline that she intends to kill herself following the hearing today which was scheduled in the Juvenile Court. Does that sum up everything that has occurred?

MS. BLIMLINE: Yes, Your Honor. She made the statement, however, to the social worker, Phil Maguire.

THE COURT: Would all the parties who are present in court identify themselves?

MS. BLIMLINE: Marilyn Blimline representing the Baltimore City Department of Social Services.

MS. WATTS: Lisa Watts, Legal Aid Bureau, representing the Respondent child, Maurice M.

THE COURT: May I have your name again?

MS. WATTS: My name is Lisa Watts from the Legal Aid Bureau.

THE COURT: Lisa Watts?

MS. WATTS: Right.

THE COURT: Ms. Watts, you represent the child?

MS. WATTS: That is correct.

THE COURT: All right.

[5] MRS. PARSONS: Robin Parsons, Public Defender's Office, Assistant Public Defender representing the mother whose name is Jacqueline Bouknight.

THE COURT: Can you tell me where the mother is?

MS. PARSONS: Your Honor, I had contact from the mother. She called me a couple of days ago to tell me that Mr. Maguire, the social worker, was going to be filing this Missing Persons report. And she told me at that time that she has been in school and during the time she has been in school, she has left the child with a friend or relative, I can't recall.

She said, "I have to take a day off from school in order to have the child so he can come to see the child, and I have been trying to reach him and have not been able to reach him to come over and see the child." So, I said, "Well, it sounds simple enough. You are off school today. Why don't you just call him and I will call him." But I was unable to reach him. But I said, "We'll both call him and have him come over and see the child, and that would be the end of the matter."

Apparently, that didn't happen. Today I [6] have spoken with my client. I spoke with her this morning, told her we were going to have the matter heard this afternoon. The problem is, nobody has seen the baby. I said, "We need to see the baby. There is a concern about the baby." I said, "Be here at one o'clock sharp with the baby." And she said she would be here. She is not here.

I have talked with, I guess it is a friend, the number where the mother can be reached, and the friend said she saw the mother with the baby leaving ostensibly for court a little before noon. And she said she saw the baby with

the mother. She was quite definite about it. That is the only information I have. The mother is now, it is almost 3 o'clock, and the mother is not here. She had to take the bus, but I don't suspect that is going to take three hours.

MS. BLIMLINE: Your Honor, in regards to the review hearing that was scheduled before Master Teaette Price this afternoon, that was postponed, a bench warrant was issued for the mother, and a shelter care order on Maurice, the Respondent, to the Department of Social Services.

The Department is very concerned, because although Ms. Parsons spoke on the phone with someone [7] who assured her they saw the baby this morning, we failed to get that person's name. We don't know who she was talking to.

The social worker, Phillip Maguire, who is present in the courtroom today last saw the child on September 4, 1987. He has been in touch with all of the relatives in Baltimore he can locate and even some out-of-state relatives. And to date, he has not been able to find anyone who has seen the child or who will consistently say they have seen the child any later than, well, one aunt, a maternal aunt said she saw the child and mother on the street in February. Other than that, it seems no one in the family has seen the child since summertime.

So, we're very concerned. This is a very serious abuse case involving a child who at the time was only six months old and involved about three fractures, one being of the femur, which is a pretty difficult bone to break on a six-month-old.

I spoke with the psychologist who examined and evaluated this lady prior to the dispositional hearing—

MS. PARSONS: I am going to object to that. I don't believe that's relevant to the matter today.

[8] THE COURT: Well, I am conducting a hearing to try to find out where Maurice M is, and I think it is important that the Court be apprised of any evidence that would tend to shed light on that situation. So, I overrule the objection.

MS. BLIMLINE: Your Honor, I spoke with a doctor who examined and evaluated this lady prior to the dispositional hearing. That was Dr. Joseph Eisenberg. He is very concerned about the safety of the minor child. He is concerned that perhaps the child is now dead or injured so severely that the mother has hidden the child. And I have a copy of his report which was not entered into evidence at the time of the dispositional hearing, but I would like the Court to be aware of it at this time, and I would like this entered.

MS. PARSONS: I object to this. This concerns evidence that could have been presented prior to disposition which was way back in August. It has nothing to do with the present whereabouts of this baby.

MS. BLIMLINE: Your Honor, it couldn't have been presented prior to disposition, because the Department of Social Services did not receive a copy [9] of this until after the dispositional hearing.

MS. PARSONS: It has nothing to do with the whereabouts of the baby.

THE COURT: If what the doctor says is accurate, Ms. Parsons, then what? Suppose the baby is so seriously injured or dead? What am I supposed to do? Say it is not relevant?

MS. PARSONS: Your Honor, there is no evidence or no indication anything is wrong with the baby.

THE COURT: Where is the baby? Bring me the baby. If I see the baby is okay, fine. I am hapy. But somebody has to protect that child. Based on what I have already

heard, this child is in serious jeopardy. Let me hear from Ms. Watts. Let me see that report, please.

MS. WATTS: Your Honor, I would basically be in agreement with Ms. Blimline's position, The fact the mother has not complied with the conditions of the order of protective supervision, the fact that many of the relatives have not seen the baby for quite some time now, and also the report that she is referring to from the doctor which also has concern about mother's ability to care for this child. Additionally, mother was supposed to show up this [10] afternoon, and she has not appeared.

So, I would support the Department's position, and I do have concerns about the whereabouts of this child.

THE COURT: Ms. Parsons, have you shared the information that you have as to the whereabouts of your client with other counsel?

MS. PARSONS: Yes, and also with Master Price earlier this afternoon.

THE COURT: You did speak with Miss Bouknight today?

MS. PARSONS: Yes.

THE COURT: Are you sure it was Miss Bouknight you spoke with?

MS. PARSONS: Yes.

THE COURT: You have spoken with her on the phone before. You recognize her voice?

MS. PARSONS: Yes. I have been on this case since February 1987. I have spoken with her a number of times, and I am quite sure it was she with whom I was speaking. Also, as I said, I spoke with her several days ago. She called me. She called me several times and left messages. I got back to her, and we spoke about this. And I had no reason to think and still don't have any reason to

believe [11] there is anything wrong. She didn't seem upset or panicked in any way. It sounded as if she were certainly intending to be here on time. She was very clear that she would be here at one o'clock.

THE COURT: She fooled all of us including you, didn't she?

MS. PARSONS: Well, I am not so sure. There may be something that happened along the way that may have prevented her from being here.

THE COURT: Like something happening to this child. How long has it been since you've seen the child?

MS. PARSONS: I have not seen the child since we were last in court.

THE COURT: In September of last year.

MS. PARSONS: But the individual that I spoke with said she had seen the child just a few hours ago with the mother.

THE COURT: Do you know that person?

MS. PARSONS: No.

THE COURT: Did you ever meet that individual in person?

MS. PARSONS: No.

THE COURT: So, you have no way of determining who that person even is.

[12] MS. PARSONS: Well, I could call the number and ask. I have spoken with her not once but about four times today. That's the only way of contacting the mother is through this number she gave me of a friend. And I have spoken with the friend at least four times. I have been calling all day.

THE COURT: Well, that would indicate to this court that you are as concerned about this child as Ms. Blimline and Ms. Watts.

MS. PARSONS: No, Your Honor, I just wanted to be sure that my client appeared and did what she was supposed to so she could continue to have her child in her custody. That is my concern, because obviously, she wants to continue taking care of her child and going to school.

THE COURT: What school is she going to?

MS. PARSONS: I am not sure.

THE COURT: Do you have the name of the school or the type of school?

MS. PARSONS: No, I don't, just that she said she was in school.

THE COURT: She said she was in school. She is how old? 21 and a half? She will be 22 in June?

MS. PARSONS: Right.

[13] THE COURT: You don't have any idea what school she is going to. Has anyone else been able to tell you that?

MS. PARSONS: No.

MS. BLIMLINE: Your Honor, if I could point out too, this mother came through the juvenile system. She has an extensive psychiatric history dating back to the time when she was four years old. I have copies of that. I don't think it is necessary to take up the Court's time to have you read them right now, but she has some serious problems.

Also, the mother herself is not hiding from the Department. The social worker saw her yesterday. But she is refusing to divulge the whereabouts of the child to the worker or to the police or to the Homicide detective who recently became involved.

THE COURT: We'll issue—who issued a warrant for this lady?

MS. PARSONS: Master Price did about an hour ago.

THE COURT: She submitted that warrant to Judge Mitchell for approval.

MR. NEAL: Michael Neal, Juvenile Court Administrator. Judge Mitchell is on jury duty today. [14] The warrant is being processed now. I will be bringing the warrant to you for signature.

MS. BLIMLINE: There is also a Missing Persons already out on the baby that has not produced the baby yet and the shelter care to the Department on the infant.

THE COURT: What was the reason that the shelter care was terminated last year?

MS. BLIMLINE: The shelter care expired at the time of disposition.

THE COURT: Why was it permitted to expire? That is what I want to know.

MS. BLIMLINE: On July 17, 1987, when Master Mitchell ordered shelter care in the home of the mother, the Department opposed that at that time. However, an exception was not filed. I can't explain why it was not. I was not the attorney of record. I have no idea. At the time of disposition, I should point out to the Court that the parties entered into a stipulation for order of protective services as opposed to commitment.

So, the parties were in agreement at the time, but keep in mind this is without the benefit of Dr. Eisenberg's psychological evaluation, they were in agreement the child should be home.

[15] The child, in all fairness to the mother, evidently, she has been doing fairly well up until last month when the child's father was killed. Evidently, it was a drug killing. And something has happened to this young mother since that time. People who have seen her think she has not been quite right since the killing.

THE COURT: Ms. Watts, do you have anything further you are offering to the Court?

MS. WATTS: No, I don't, only I recently have acquired this case. I was not the attorney for the child when the case first came in last year. So, I wouldn't know how to answer that.

MS. BLIMLINE: Your Honor, I would also like to ask the Court, that if it is possible, when this lady is picked up, if she is ever picked up by the police, that she receive a psychiatric evaluation to in some way judge her ability to provide care for this child now.

THE COURT: Well, Mr. Conti from Medical Services is present in the courtroom.

MS. PARSONS: Your Honor, we would be opposed to that. Until the mother is located and until there is some evidence, some reason to believe there is something wrong with her or the baby, or [16] both, I would oppose any ordering of the psychological or psychiatric.

MS. BLIMLINE: Your Honor, I think there is more than enough reason to suspect that something is wrong. She failed to appear today. Ms. Parsons pointed out to her our concern, many people's concern, that the baby is dead. So, I think she has indicated by her failure to appear there is definitely something wrong. Whether that be with the child's health or welfare or whether that be with her own emotional health, I don't know.

THE COURT: What is the quickest way we can get ahold of this lady physically?

MS. BLIMLINE: I would suggest the police send, that you send the police out to see if you can pick her up at the home where Ms. Parsons contacted her earlier this morning. The social worker has an extensive list of addresses for relatives. I think if the police made a concerted effort to seek her out at all those relatives' homes, I think that would perhaps be a good idea.

I am really concerned about the passage of every day that this child—I just received this case the day before yesterday. But after speaking to Dr. Eisenberg last night on the phpone, to say [17] that he was extremely concerned about the child's wellbeing is putting it very, very mildly. I think we need to do whatever can be done to try to locate the mother and the child.

Your Honor, I also have copies of the medical reports that deal with the child's injuries at the time this first came before the Juvenile Court if you would like to see those.

THE COURT: Can you highlight those injuries for the Court so that Mr. Conti is aware of them, please?

MS. BLIMLINE: I shared these with Mr. Conti earlier yesterday.

THE COURT: Mr. Conti, you are aware of all of this?

MR. CONTI: Quite aware.

THE COURT: Are you aware of Dr. Eisenberg's position dated July 27, that he is concerned about the safety of the child?

MR. CONTI: Yes.

THE COURT: What would your view be of all this, Mr. Conti, based on your knowledge of the circumstances?

MR. CONTI: My belief after reading the material is that if this individual is arrested, she [18] is unquestionably in need of urgent evaluation because of the potential possibility of harming herself. When I learned earlier this afternoon that apparently Master Price issued a warrant—is that correct?

MS. BLIMLINE: Yes, it is.

MR. CONTI: —I called Baltimore City Jail in fact to be sure she would be handled special if she came in today.

I would suggest that if this court takes some other kind of action, that I would leave my private office answering service number so that I may at least be in touch to see that she receives any special handling she might need after her arrest. I see this as an individual in a crisis simply from the paperwork.

MS. PARSONS: Your Honor, I'd like to underscore he has not met my client. He has information he has only read and what Ms. Blimline has told him.

THE COURT: Ms. Parsons, this whole matter could be cleared up if your client comes in and brings the baby in.

MS. PARSONS: I know.

THE COURT: You yourself said that you spoke with her at least four times—

[19] MS. PARSONS: No, with a neighbor, a friend.

THE COURT: With a neighbor or a friend, whoever it is, and she allegedly left her residence to come to court. She was to be here at one o'clock. That was two hours and 40 minutes ago. She has not appeared. You yourself told her according to what you told me that there was concern that the baby was dead. Quite frankly, that concerns the daylights out of of this court.

The child representative, Ms. Watts, has joined in with the Department of Social Services. Apparently, a decision was made to terminate the foster care relationship even in light of the finding by Dr. Eisenberg that it is not recommended that she regain custody of the child, because it does not appear that she is emotionally capable of providing the protection, nurturance, and care that would be required for the child's safety and security.

So, she is in need of intensive and extensive intervention both on emotional and social levels to help her deal constructively with not only her own internal issues but also those requirements for independent and self-sufficient

functioning. What that tells me is we have a lady in a severe [20] crisis here. We also possibly have a dead child somewhere which just depresses me to no end, I am not going to kid you.

Since Master Price has recommended the issuance of a warrant, and I have to sign the warrant, I am going to sign the warrant. I'd like to get in touch with somebody in the Police Department to have them go out and take a look into this situation as rapidly as possible.

MS. BLIMLINE: Your Honor, we had a Homicide detective downstairs in Juvenile Court.

THE COURT: Is he still there?

MS. BLIMLINE: Detective James Jones.

THE COURT: Is he still there?

MS. BLIMLINE: He was there when we came up here. In fact, he said he was coming up.

THE COURT: Could you bring Detective Jones in here, please?

Let me have, if I may, please, Ms. Parsons, the addresses and the phone numbers that you have for Miss Bouknight.

MS. PARSONS: The last address I have is 1829 North Washington Street.

THE COURT: That's near Federal, isn't it?

MS. PARSONS: Zone 13.

[21] THE COURT: That's near Federal. Go ahead.

MS. BLIMLINE: The social worker who just left would probably have the most up-to-date address.

THE COURT: What is the phone number you used to contact the client?

MS. PARSONS: The phone number is 327-8873.

THE COURT: And what is the phone number of the person who claimed to be a friend?

MS. PARSONS: That's it. The only phone number I have for Jacqueline is the phone number, this phone number which is not hers but is that of a friend or relative.

THE COURT: Do you know the name of that person?

MS. PARSONS: No, I don't.

MS. BLIMLINE: Your Honor, if it would be possible too, if the police were sent out, Dr. Eisenberg was concerned that this girl not be treated in any kind of threatening way. He said emotionally, she is functioning at about an eight to ten year old level. So, he feels, especially with the suicide threat she has made, which he thinks we all should take very seriously, he thought the best thing to do [22] was to deal with her as if she were a ten year old child, a very nonthreatening kind of approach.

I don't know what happens when the police go out and pick someone up. But if they could be made aware of, if we ever expect to find out what happened with the child, that we're going to have to treat this lady very gently, I think.

THE COURT: I had already come to that conclusion, Ms. Blimline. My problem is, I don't know where she is, and I don't know who is going to come in contact with her first and what the reaction she is going to have with that individual is going to be. And we are not picking her up for purposes of punishing her. We are picking her up in an attempt to find the child.

MS. BLIMLINE: But I am not sure she will know that. Ms. Parsons said the last time she called that number, she did inform her a bench warrant had been issued and the police were going to be looking for her.

MS. PARSONS: I did forget to say when I spoke with my client, I explained she had to be here. And she said, "Well, if I come, they just want me to come so they can snatch the child."

I said, "Well, there is no guarantee [23] they are not going to remove the child from your care if you come to court with the child." I said, "But they want to see the child, and they have an even bigger concern that there is something wrong with the child and that the child could be dead." And she said, "Oh, no." And I said, "Well, we can clear it up by just bringing the child in."

So, that was the conversation. She appeared absolutely horrified when I said that.

MS. BLIMLINE: Of course, she was aware already that was what we were suspecting, because the social worker had contact with her as I explained to you.

MS. PARSONS: I think she may be, if she is deliberately staying away, it is probably because she doesn't want to lose the child. She is afraid, and, of course, that is what is going to happen if she brings the child. The child will be removed.

THE COURT: What this court has to look at is what is in the best interest of this child. And quite frankly, that child is paramount on this court's mind. That child was born on October 3, 1986 which means the child is about 18 months old now, and the child is a baby. Based on all the information before the Court, it is obvious the child is in some [24] jeopardy because of the actions of the mother in refusing bring her in. The very fact she has failed to come today tells me after you told her the reason for coming, that something is seriously wrong. And I can't shake that from my mind.

MS. BLIMLINE: The social wowrker also attempted to get in touch with medical clinics around the city to see if she has been bringing the child in for any kind of medical

care, and he has not been able to locate one where the child has been seen.

THE COURT: Well, the motion to cite Miss Jacquline Bouknight for contempt is granted.

MS. PARSONS: Your Honor, I am sorry to interrupt, but I will oppose that on the basis that the mother has not been served, and we had not been given notice, neither she nor I. I just received the motion this morning but certainly have not had a reasonable time to prepare a defense. And the rules do require she be served, and certainly that I would have some time to prepare something on her behalf.

THE COURT: Once I bring the mother before the Court with the child, you will have all the time in the world. But until that child is safeguarded, I must overrule all of your objections at this time. The child's representative, Ms. Lisa [25] Watts, has joined in with the Department of Social Services, and in balancing the obligation of the Court to look out for the best interest of the child, I am persuaded the Court's action is appropriate at this time.

I obviously am not going to make a finding of a contempt. I am going to issue a contempt citation against her for failing to appear. She knew she was to be here today. She failed to appear. So, she will be cited for contempt.

I will issue the Order to Show Cause. The bench warrant will be signed by me as soon as it is presented to me. And I would like to have the detectives go out and try to pick her up in as unobtrusive a fashion as possible, keeping in mind that we have to find the child.

If she fails to produce the child, then I will order her held without bail in Baltimore City Jail until the child is found. I don't think I have much choice. If someone can give me some other reasonable alternative, I will be glad to consider it.

Ms. Parsons, you have no other alternative to the Court?

MS. PARSONS: No, I am sorry, I don't. [26] I've made the efforts I made to get her here. I don't know why she is not here.

THE COURT: Ms. Watts?

MS. WATTS: I really have no other alternative, Your Honor.

THE COURT: Ms. Blimline?

MS. BLIMLINE: I would again request the Court order she have an immediate psychiatric evaluation.

THE COURT: There is little question about that. Mr. Conti has indicated this is a lady in a crisis at this point, and the Court places great weight on Mr. Conti's views in that area. He has indicated he has reviewed the material which I have reviewed, and I am satisfied that his assessment is an accurate assessment, especially superimposing upon that what has happened between Ms. Parsons and her client today. What she has reported today frightens the daylights out of me. She was supposed to be here, and she failed to appear. That tell me something wrong may be going on.

Ms. Parsons, you have received a copy of the Order to Show Cause?

MS. PARSONS: Yes.

THE COURT: You cannot respond to it until [27] such time you have actually spoken with your client, I would believe. Would that be accurate?

MS. PARSONS: Yes.

THE COURT: Upon consideration of the Motion for Contempt, Petition for An Issuance of an Order to Show Cause, it is this 20th day of April, 1988 in the Circuit Court for Baltimore City, Division for Juvenile Causes, and the record should reflect this court is designated by Chief Judge Murphy, Court of Appeals, as the alternate Juvenile

Court judge of Baltimore City, it is ordered that Jacqueline Bouknight, mother of the Respondent infant, show cause at an immediate hearing as soon as she is apprehended why the relief sought should not be granted, provided that a copy of the Motion for Contempt and Petition for the Issuance of the Order to Show Cause, this order be served on her immediately.

at one o'clock she was to be here and she is not here. So, we can't serve her. So, what I am going to do is show cause at an immediate hearing. I am going to cross out on your copies, if you look at your copies, on April 20, 1988 at 1:00 p.m., and that you have an immediate hearing after apprehension, with the words to be inserted "before this court," [28] why the relief sought should not be granted, and provided a copy of this order to be served on her immediately or as soon as possible. Cross out "at or before the immediate hearing on this matter" and insert the words "to be served on her as soon as possible." Is that acceptable?

MS. BLIMLINE: Yes, Your Honor.

THE COURT: All right. Good luck. I hope and pray we have some success in getting the warrant from Master Price, and I will ask to see the warrant as well.

MS. BLIMLINE: The worker should be back in a few moments, and he can give the Court other addresses of relatives.

THE COURT: The warrant is being signed by the Court at this time, and there will be no bail on the warrant, because I want this lady brought before me immediately.

(End of proceedings)

Circuit Court
Baltimore City

DIVISION FOR JUVENILE CAUSES

PETITION: 88704202

IN THE MATTER OF MAURICE M

I.D.: 0629

WARRANT—STATE OF MARYLAND

TO THE POLICE DEPARTMENT OF BALTIMORE CITY, GREETINGS

WHEREAS, PETITION HAS BEEN MADE BEFORE ME, THE JUDGE OF THE CIRCUIT COURT FOR BALTIMORE CITY, DIVISION FOR JUVENILE CAUSES ON THE OATH OF JAMES L. BENTON, DEPUTY CLERK WHO CHARGES JACQUELINE BOUKNIGHT DOB: UNKNOWN, BLACK/FEMALE LKA—1726 N WASHINGTON ST., BALTIMORE, MD 21213 ON 4/20/88, JACQUELINE BOUKNIGHT (PARENT) FAILED TO APPEAR FOR A HEARING BEFORE MASTER PRICE

IN BALTIMORE CITY, STATE OF MARYLAND, ON OR ABOUT THE 20TH DAY OF APRIL 1988.

YOU ARE THEREFORE HEREBY COMMANDED IMMEDIATELY TO APPREHEND THE SAID JACQUELINE BOUKNIGHT (ADULT) AND BRING HER BEFORE ME AT THE COURT HOUSE ROOM 104, IN THE CITY OF BALTIMORE TO BE DEALT WITH ACCORDING TO LAW, HEREOF FAIL NOT AND HAVE UNTIL THEN AND THERE THIS WARRANT.

GIVEN UNDER MY HAND AND SEAL THIS 20TH DAY OF APRIL IN THE YEAR OF OUR LORD NINETEEN HUNDRED EIGHTY EIGHT. SITTING IN THE CIRCUIT COURT FOR BALTIMORE CITY DIVISION FOR JUVENILE CAUSES.

/s/ Edward J. Angeletti
JUDGE

no bail

5/2/88
quash warrant
WARRANT NO. 161-88

MATTER OF JACQUELINE BOUKNIGHT (ADULT) 1726 N WASHINGTON ST. 21213 "ON THE WING"

/s/Saundra E. Banks
CLERK BY JAMES L. BENTON DEPUTY CLERK

WHEN THIS ADULT IS APPREHENDED, DELIVER HER TO THIS COURT AT ONCE AND NOTIFY THE WITNESSES WHOSE NAMES APPEAR HEREON.

CEPI DET. JAMES A. JONES 26 APR 1988
CEPI IN BALT. CITY JAIL SHELTA STEWART

Circuit Court For Baltimore City

April 27, 1988

[Title omitted in printing]

[2] PROCEEDINGS.

THE COURT: Are you ready?

MS. BLIMLINE: Yes. The Department would like to call the case of Maurice M , Docket No. 88704202. Marilyn Blimline, Baltimore City Department of Social Service.

MS. WATTS: Lisa Watts, Legal Aid Bureau representing the Respondent.

MR. HINES: Andrew Hines, Assistant Public Defender on behalf of the respondent's mother, Ms. Jacqueline Bouknight. I'm standing in for Ms. Parsons.

THE COURT: The Court reviewed the petition filed by the Department of Social Services to adjudge Miss Bouknight in contempt of court.

MR. HINES: Yes, Your Honor, I guess preliminarily, before you go any further, Ms. Parsons has been involved with this case from the beginning. When we found out about this a half hour ago, I contacted Ms. Parsons. She went home ill. I think it would be in the respondent's mother's best interest to hold the matter over until tomorrow when Ms. Parsons can come here and give the mother the effective assistance she [3] deserves. I, quite frankly, don't have a file. The only thing I have before me is the motion that was filed by Ms. Blimline.

THE COURT: If we do hold it over, while I have not heard the other counsel, in all likelihood, counsel, this lady is going to be detained in Baltimore City Jail.

MR. HINES: Yes, I understand that, Your Honor, and it certainly sort of leaves my client in kind of a bind.

THE COURT: I'm not trying to persuade you to do one thing or another in behalf of your client. The practical matter is, according to the motion for contempt, there are very, very serious concerns held by the Department of Social Services. The lady had to be brought in here by a warrant for her arrest. She's here now with representatives of the police department who have effected that warrant. The Court has also been advised that the Medical Office of the Juvenile Division of the Court, as well as the Medical Office of the Court are not available to schedule or arrange a medical evaluation.

MR. HINES: No. Although, I was not present at the last hearing, I believe this was [4] supposed to to be done immediately.

THE COURT: It would have been done immediately, but the lady was not here.

MS. BLIMLINE: Well, Nicholas Conti was present at the last hearing and effectively put himself on call so that if the woman was picked up anytime day or night, he could be called either at his office or his home. I have spoken with his office today, and they were supposed to reach him by beeper.

THE COURT: Have they?

MS. BLIMLINE: I haven't heard from them.

THE COURT: What do you wish to do.

MS. BLIMLINE: I would object to holding it over until tomorrow. The issue involved in this case, I think, is so serious. We have no reliable information from anyone that the child has been seen since September 4th. The injuries were very severe when the child first came in at age six months, and he's only eighteen months now. We know of no medical facility who has seen him in a while at least. We know of no relative who has seen—perhaps saw the child in February on the street with the mother. Given

the nature [5] of the extent of injuries and the very young age of today. I would like to proceed today for the mother to get a psychiatric evaluation and to be held until she produces the child.

THE COURT: Ms. Watts.

MS. WATTS: I think that at this point since it is not Mr. Hines' case, holding it until tomorrow morning, I don't see that would do any harm. I would not object to it being held until tomorrow morning.

MR. HINES: My understanding is a psychiatric evaluation has been ordered.

MS. BLIMLINE: It has been ordered but not signed.

THE COURT: There is an order for psychiatric evaluation that was prepared and submitted for the Court's approval. Judge Angeletti is not available today. This matter has been returned to me.

MS. BLIMLINE: Well, he did order immediate psychiatric evaluation when she was apprehended and asked me to submit the order, and it would be signed when she was apprehended.

THE COURT: Is that your recollection of the proceedings?

[6] MS. WATTS: That was my recollection, when she was apprehended, he would sign the order for immediate psychiatric evaluation.

THE COURT: She can't be evaluated immediately by the medical office.

MS. BLIMLINE: Well, unless someone can get in touch with Mr. Conti.

THE COURT: Let's assume for the moment they cannot get in touch with Mr. Conti, what would be the immediacy of an order? Where will she be evaluated? Would they take her to University Hospital for the term of evaluation?

MS. BLIMLINE: I don't know what the plan is for evaluation.

THE COURT: Assume for the moment they cannot get ahold of Mr. Conti or anyone from the medical office of this court, what would be the plan tonight for this woman if this order requiring immediate psychiatric evaluation is signed?

MS. BLIMLINE: I don't know that anything could be arranged at this late date to have her—

THE COURT: You mean this late hour. It is now 4:45. What would be the problem with [7] holding it over until tomorrow?

MS. BLIMLINE: Tomorrow morning or afternoon, Your Honor?

THE COURT: Tomorrow morning.

MS. BLIMLINE: Press of other cases would be the only problem that I would have. As long as the woman is held.

THE COURT: The Court is not intending to release this woman. If this case is going to beheld over, she's going to be remanded to sheriff on no bail. She will remanded to Baltimore City Jail on no bail status to brought back tomorrow for continuance of proceedings.

MS. BLIMLINE: I would have no objection with holding it over as long as she is held without bail.

THE COURT: Did Judge Angeletti issue a finding that she was in contempt?

MS. BLIMLINE: He issued the show cause and made just a few changes in the submitted order. He changed, on April 20, 1988 at 1 p.m. to, after apprehension, and in the very last line of the order he changed, at or before the immediate hearing on this matter to, to be served on her as soon as possible, and he signed it on [8] 4-20-88.

MR. HINES: May I be heard with respect to—

THE COURT: Yes.

MR. HINES: It seems to me it is kind of contradictory for the department to be asking for sanction. Either she is competent or not competent. If she is not competent, I don't think contempt is the proper remedy in this case. It seems she is trying to get both sides of the cake or whatever. She has already gone through the trouble of trying to get an evaluation as soon as possible. I just don't believe that contempt is the proper remedy.

THE COURT: The Court does not see any order signed by Judge Angeletti in the file. Perhaps you all know of something that I don't know about. What I'm referring to is an order finding this lady in contempt of Court.

MS. BLIMLINE: All I know is at the hearing, he stated he was signing the show cause order and with the changes I just read to you.

THE COURT: All right.

MS. BLIMLINE: They should be in the file because the juvenile file was in the [9] courtroom.

THE COURT: There is a blank copy of an order to show cause, that Jacqueline Bouknight, mother of the respondent, show cause in an immediate hearing on April 20, 1988, hearing before Judge Angeletti. Is that the order or show cause that you were referring to? Is this the one Judge Angeletti made changes on?

MS. BLIMLINE: Yes, Your Honor, that's the one.

THE COURT: He made changes to this order?

MS. BLIMLINE: Yes, Your Honor.

THE COURT: I don't see anything in here.

MS. WATTS: I would also agree with Ms. Blimline that he did make those changes on the record, she stated, when he was signing it.

THE CLERK: Judge Mitchell, I was the clerk up there that day. He did make changes, but where the order is, I do not know.

THE COURT: The Court is going to hold her over, under the warrant issued. There is no bail on the warrant. The matter will be before this Court tomorrow morning at 9:15. The mother [10] of the child, the respondent, in the motion for contempt, will be remanded to the custody of Baltimore City Jail, to be brought back tomorrow morning. At tomorrow morning's hearing, we will discuss the status of this order including an order for psychiatric evaluation; that should be signed perhaps. By that time we should also have made arrangements with Mr. Conti that the lady be evaluated.

If Judge Angeletti found this woman to be in contempt of court, she can always purge herself of the contempt by revealing the location of her child, Maurice M , before we conclude this proceedings. We want to give her the opportunity to purge herself of contempt at this moment.

Are you Ms. Bouknight? Are you Ms. Bouknight? Are you Ms. Bouknight? Would you stand up, please.

Ms. Bouknight, I'm going to give you the opportunity to speak with your attorney Mr. Hines to see if there is going to be any purging of the contempt. What that means is that you are held in contempt of this Court's order. You have the opportunity to remove yourself from that contempt [11] status by simply indicating the whereabouts of your minor child, Maurice M . Do you understand me?

MS. BOUKNIGHT: Yes.

THE COURT: Where is Maurice M.?

MS. BOUKNIGHT: He's in Texas.

THE COURT: Where is he in Texas?

MS. BOUKNIGHT: 3417 Denton Avenue.

THE COURT: 3417 Denton Avenue, D-E-N-T-O-N?

MS. BOUKNIGHT: Yes.

THE COURT: What community? What is the city?

MS. BOUKNIGHT: Dallas, Texas.

THE COURT: Contact the Dallas Police Department and have them verify this situation. If it is verified and you can report that to the Court tomorrow, we will strike the finding of contempt.

MS. BLIMLINE: Your Honor, could I ask when this child was supposedly taken to Dallas, Texas.

THE COURT: Yes, you may.

MS. BOUKNIGHT: He was taken before his father got killed, and then they came back, and [12] then a week after he came back, he was taken back down there.

THE COURT: Who is he with in Dallas?

MS. BOUKNIGHT: He's with my sister.

THE COURT: What is your sister's name?

MS. BOUKNIGHT: Barbara.

THE COURT: Last name, please?

MS. BOUKNIGHT: The same as mine, Bouknight.

MS. BLIMLINE: Your Honor, on the 20th, Ms. Bouknight spoke with her attorney, Robin Parsons, and stated she had her child with her, and was on her way to court on that date. I think perhaps she's not telling the truth.

THE COURT: Well, I said I'm not going to release her. Number two, it is a simple matter of contacting the Dallas Police Department, and they making an attempt to contact her sister in Dallas to verify the presence of the child. If you wish an order to be issued to take that child into custody, I'll issue it.

MS. BLIMLINE: Yes, Your Honor, I would like such an order.

THE COURT: Well, we already have a protective service— .

[13] MS. BLIMLINE: The child is under the shelter care order of Master Price.

THE COURT: Fine. That's sufficient to contact them and ask the police in Dallas to verify the location of the child. If they verify that, they should take the child into court custody; then they should take the child to the juvenile court and speak to Judge Craig Penfold, P-E-N-F-O-L-D. Judge Penfold is one of the presiding judges of the juvenile court, and the child will be returned to Maryland in due course. First, however, let's get the Dallas Police Department to verify that this information given by the mother is correct. If it is not, we will deal with that tomorrow. Right now, I'm going to remand her to the Baltimore City Jail, pursuant to this warrant. If the information is verified by the Department of Social Services, we will take care of her and release her on the contempt. We also have to do a psychiatric evaluation, if you wish to proceed to that.

MS. BLIMLINE: Also with the scheduling of review hearing.

THE COURT: That is correct. Is that agreeable to you, Mr. Hines?

[14] MR. HINES: Yes.

THE COURT: Mr. Cuffia, will you take this woman to— identify yourself.

DET. JONES: Detective Jones, Baltimore City Police Department. Her processing hasn't been completed. They informed me to bring her back, and they'll send her to jail.

THE COURT: All right. Fine. You may keep her in the custody of the police department to complete necessary paper work.

MR. HINES: But she will be here tomorrow morning?

THE SHERIFF: Excuse me, Judge, if they keep her tonight at Central, it would be much easier to get her than try to get her from the jail.

THE COURT: Would you have one of the sheriffs go down and get her tomorrow. You hold her over, and make sure that no commissioner attempts to set bail on the Circuit Court warrant where there is no bail. If they need to reach me, I can be reached. They know how to do that. Thank you. Nobody should touch my warrant with no bail. Thank you, sir.

MS. BOUKNIGHT: Bitch.

[15] THE COURT: Excuse me, Ms. Bouknight. Let me tell you something, you may be upset and angry right now, but you don't want to buy that trouble. I'm going to presume that because there is a request for psychological evaluation, your calling the Court a bitch was in error. If it continues, however, she's going to have more trouble.

MR. HINES: I will certainly speak with her.

(Proceedings adjourned.)

Circuit Court For Baltimore City

April 28, 1988

[Title omitted in printing]

[2] PROCEEDINGS.

This is the proceedings involving Jacqueline—excuse me, Maurice M Petition No. 88704202.

Counsel, put your appearances on the record.

MS. BLIMLINE: Good afternoon, Marilyn Blimline representing Baltimore City Department of Social Services.

MS. WATTS: Lisa Watts, Legal Aid Bureau, representing the respondent.

MS. PARSONS: Robin Parsons, Assistant Public Defender representing the mother.

THE COURT: Ms. Parsons, you were not here last evening, because of illness. Your client was represented by Mr. Hines of your office. When we ended yesterday's proceedings, your client had been just arrested by Baltimore City Police on a warrant signed by Judge Angeletti. She was brought to this Court and given an opportunity to purge herself of the civil contempt. She was given the opportunity of advising the Court and parties present of the location of her child, Maurice M . She gave us an address where we could find Maurice. It was in [3] Dallas Texas. I want to hear a report from the Department of Social Services of their efforts with the Dallas Police Department to locate this child.

There was also an order for psychiatric evaluation which was approved by Judge Angeletti but he's not available to sign it. I did sign it this morning, and it is my understanding, she has been evaluated, and you have received a copy of the report.

MS. PARSONS: Yes.

THE COURT: Mr. Conti of the Medical Office advised the Court that the evaluation indicates that your client is competent to assist you, and also competent to proceed with this matter.

Ms. Blimline, what is the situation?

MS. BLIMLINE: Okay. In regards to Dallas, I made some phone calls last night and spoke with a Sgt. Maxwell of the Dallas Police Department and then with the child abuse investigator with the Dallas police, Fred McDonald. He ran a check and stated there was no such address and they could find no record of Ms. Barbara Bouknight in Dallas, City of Dallas, [4] County of Dallas, Lake Dallas which is Dallas County. However, a police officer present today, Officer Shawn DeShields (phonetic) has given new information from her superior that he had spoken to a Det. Sgt. Clower (phonetic) of the Dallas police and there is a 4730 Denton Drive, Apt. 109, and that they were able to reach a Barbara Bouknight, but that she has not seen the child ever. She did see a photograph of the child as an infant.

THE COURT: The child is not in Dallas with that person?

MS. BLIMLINE: No.

THE COURT: Is she related to the—

MS. BLIMLINE: Sister.

THE COURT: She's a sister of that lady?

MS. BLIMLINE: Yes, sir.

THE COURT: Okay. Ms. Parsons.

MS. PARSONS: On behalf of my client, she absolutely insists that the child is there, and said if they just go to the home and look, the child is there. She absolutely insists that he's there.

THE COURT: We are in a situation where [5] your client has told you on the 20th of April, when this case was scheduled for some proceedings, that she would bring the child to court in a matter of moments. She did not bring the child to court. She did not appear herself before Judge Angeletti. My understanding is, she also told the authorities that the child was in Baltimore and at the grandmother's house or some relative in Baltimore. That proved to be incorrect. My understanding is, there is an address that was given for a relative in South Carolina that had the child; that's incorrect. Now, we heard yesterday that the child is with someone in Dallas, Texas; that has proven, so far, to be incorrect.

MS. PARSONS: Well, Your Honor, I'm just—I don't know if the police have actually gone to that address to see if the child is in fact there; I don't know that.

MS. BLIMLINE: If I could say, Your Honor, the police did go to the home themselves; also talked to neighbors. Ms. Barbara Bouknight has a son of her own, and this child is not there.

THE COURT: Your client appears to be continuing in the contempt of Court, and now the [6] Court is starting to get very concerned about the whereabouts and safety of the minor. It is our understanding that the child is about eighteen months old, and no one has seen the child for several months.

MS. PARSONS: That is my understanding also.

THE COURT: Without being dramatic, no one knows whether the child is living or dead.

MS. PARSONS: I haven't seen him. I have been in touch with the mother from time to time. She indicated that the child is fine, and she's going to school.

THE COURT: Then where is the child?

MS. PARSONS: In Texas, according to my client, the child is in Texas.

THE COURT: I hope your client understands that being in civil contempt means that you stay in jail until you purge yourself of contempt. There is no term for such an imprisonment.

MS. PARSONS: Your Honor, I would like to address—

THE COURT: That there is also no bail.

MS. PARSONS: I have explained the [7] situation to her carefully, and I would argue, however, on her behalf that when one is in civil contempt, the opportunity to purge themselves has to exist, and the Court has given her this opportunity, at least technically, by allowing her to tell where the child is. If that opportunity—it is my argument, that opportunity could be not a realistic one and not perhaps even a constitutional one, if her purging herself may involve admitting to a crime of some sort.

THE COURT: No one is asking her to admit to anything. We are very much conscious of her rights pursuant to the constitution. No one has asked her what has happened to the child or whether she committed any act that in anyway harmed the child. The only thing that is required here is that she produce the child pursuant to the order of this Court. If she fails to produce the child, she remains in contempt of this Court. It is my understanding that no one has questioned her about any aspect of this case that would—unless they have explained her rights. If they have not done that, they ought to start considering her. This Court is not asking her anything, in its opinion, that would allow her to invoke her Fifth [8] Amendment privilege. If she chooses to do that, but refuses to answer what I think is a lawful, legal question of the location of this child, she stays in jail until she purges herself of contempt. It is an opportunity available twenty-four hours a day, seven days a week. What we will not permit, however, is that she purge herself of contempt by giving up information that we cannot verify. If we verify the information as to the location of the child, we will release her from the civil contempt.

MS. PARSONS: Well, I would at least request that the efforts to verify the information she has given the Court, and given me, and still continues to give me, that they be a little more strenuous at least.

THE COURT: Ms. Blimline, can you tell us what happened when the Dallas police investigated that matter.

MS. PARSONS: Actually, I can say what the detective told me on the phone, and he ran a computer check and was not able to find even an address for this woman. Now, the officer present today can testify as to what was done by her office, when they did finally verify. I thought [9] yesterday that we were given the address 3417 Denton Avenue, and the address turned out to be 4730 Denton Drive, Apartment 109, but the detective can testify as to what efforts were made by her office.

THE COURT: Proffer to the Court.

MS. BLIMLINE: Just that they did go out to the house, they found the house number for her sister, went out to check the house; in fact called the sister into the police office also and questioned her, questioned neighbors, and no one has seen this child. The sister states, she's never seen her nephew only a photograph of him when he was an infant. It seems to me—

THE COURT: Do you want that under oath and on the record? If you wish, we will swear the witness and have her testify to the efforts she is aware have been made by authorities in Dallas Texas.

MS. PARSONS: Of course, Your Honor, her information would be hearsay.

THE COURT: Of course, it would be hearsay. You are not going to Dallas, and this Court is not recessing to reconvene in Dallas, Texas to find out where this child is. Of course, [10] absolutely, it is hearsay.

MS. PARSONS: No, I don't—I'm sure that's the information she would give.

THE COURT: Okay. Unless someone can give us more information to assist us in the location of this child, this hearing is at a close and she remains in contempt of this Court. I have given her again the opportunity to purge herself of contempt through the means of a proper address, person, or location for the child Maurice Miles, the subject of these proceedings. She can do that at any time by simply indicating to you, Mrs. Parsons, to anyone at the jail, or anyone in authority, including this Court, that information. This Court also is open in the sense of a person, of a judge twenty-four hours a day and seven days a week.

MS. PARSONS: Your Honor, if she in fact doesn't no exactly—if she sent the child to Texas, and the child not with her sister, not in her home, but in some other home in Texas and the mother really does not know the exact whereabouts the child is, I'm not going to ask you, but it is my contention, that is not a realistic opportunity to purge herself.

[11] THE COURT: This child was definitely in her custody, pursuant to the order of this Court. If she doesn't know who has it, then she better get on the horn and find somebody who might have this child. That is her responsibility; it is not ours. We are not going to release her until she does.

THE COURT: Again for the final time for this proceedings, she's given the opportunity to purge herself of contempt of this Court by producing the child; does she wish to take advantage of that opportunity?

MS. PARSONS: No, Your Honor, not at this time.

THE COURT: The report from Dr. Rappaport dated April 28, 1988 will be placed in the court file as part of the exhibits in the matter. The warrant executed by Judge Angeletti on April 20, 1988, setting no bail will remain in effect. This Court will take no action in regards to it, and return her to the sheriff.

MS. BLIMLINE: Your Honor, I would also ask that the court set a review date. The child right now is under shelter care order that will be expiring around the 20th of May. So I would ask [12] that a review date be set that that can be taken care of.

THE COURT: Miss Parsons, what is your availability for a review date?

MS. PARSONS: Any time. Just not on a Friday.

MS. BLIMLINE: And I would ask that it not be set on a Monday.

THE COURT: All right. We will schedule the matter for review and send notice to counsel. We suggest that you initiate an appropriate criminal investigation in this matter.

MS. BLIMLINE: Okay. Thank you, Your Honor.

(Proceedings concluded.)

Medical Service
of the
Circuit Court for Baltimore City

JONAS R. RAPPEPORT, M.D.
CHIEF MEDICAL OFFICER

JAMES E. OLSSON, PH.D.
CHIEF PSYCHOLOGIST

NICHOLAS P. CONTI, LCSW
DEPUTY DIRECTOR

503 COURTHOUSE WEST
100 N. CALVERT ST.
BALTIMORE, MD. 21202

Telephone: 396-5013
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April 28, 1988

CASE OF: JACQUELINE BOUKNIGHT, AGE 21, CASE NO. 20812
REASONS: EMERGENCY CONSULTATION FOR COMPETENCY AND DANGEROUSNESS, PETITION NUMBER 88704202
REFERRED BY: THE HONORABLE DAVID B. MITCHELL, CIRCUIT COURT, PART 11
EXAMINED: MEDICAL SERVICE, CIRCUIT COURT, APRIL 28, 1988

EMERGENCY CONSULTATION

I saw Ms. Bouknight for almost one hour and reviewed the appropriate records. It is my opinion that Ms. Bouknight understands the nature and consequences of the charges against her and is able to assist her attorney in her defense. It is further my opinion that Ms. Bouknight is not currently dangerous to herself or the person or property of others. I can not specifically render an opinion as to whether or not she might be dangerous to her child,

Maurice, since there is evidence in the record per the psychological test report of Joseph Eisenberg, Ph.D., of July 27, 1987, which indicates serious concern about her ability to render adequate care to her child. In addition, she appears to be basically a very angry, negativistic type of individual who frequently misunderstands what others are about and who easily becomes involved in power struggles, as she is currently involved with both the Court and the Department of Social Services.

She informs me that the child is with her sister at 3417 Denton Avenue, Dallas Texas. She apparently sent the child there for a visit at some time in the past several weeks (?), claiming that she didn't think there was anything wrong with that.

If the Court is desirous of trying to resolve this current problem with Jacqueline in a way that would best serve her, the baby and the Court, it will take a great deal of patience with an effort to try to prevent Jacqueline from becoming angry and negativistic. In this direction, should an impasse appear to be developing, Mr. Conti or members of the Medical Office staff could be of some assistance.

Respectfully submitted,

/s/ Jonas R. Rappeport, M.D.
Jonas R. Rappeport, M.D.
Chief Medical Officer

JRR/ps

BOUKNIGHT, Jacqueline

DSS Contacts 8/18/87 through 5/5/88

8/18/87 Disposition Hearing; Child to remain with mother; Order of Protective Supervision; Intake CPS Worker obtains signed consent from Ms. Bouknight to obtain written copy of the Psychologist's report; Family and Children's therapist had a copy but could not give such to the Department on 8-18-87.

8/20/87 Foster Care Worker T/C to Lilly Alston, Income Maintenance. She needs a memo explaining what happened at court so that Ms. Bouknight can start receiving AFDC.

8/25/87 Foster Care Worker T/C from Mrs. Dixon, In-home Aide. Jackie Bouknight is not receiving AFDC yet; In-home Aide H.V. Saw mother and child.

8/31/87 Foster Care Worker T/C to and H.V. with Bouknight. Client requested Similac with Iron formula and diapers for Maurice. Maurice had 104° temperature and she took him to the doctor. Transported mother and child to get a prescription. Client requested a new MA card for Maurice; Foster Care Worker T/C and referral to Emergency Services. Took Ms. Bouknight to 1500 Greenmount - 2nd floor;

Foster Care Worker T/C to WIC. WIC requested a letter saying that client applied for Emergency Food Assistance, give client some tokens, have her get a letter from the people she is staying with stating that they are providing housing and some food and have her bring these letters to the WIC office Wednesday morning on Eastern Ave-

nue. Took Mother and child to Sears for clothing.

9/1/87 CPS Worker Appointment letter sent to Ms. Bouknight at 1726 N. Washington Street.

9/4/87 Foster Care Worker T/C from J. Bouknight. Ms. Bouknight said she never came to pick up the forms for WIC and tokens because it was too hot. She wanted me to mail it to her. Mrs. Dixon, In-home Aide, comes every Tuesday morning from 8:30-11:30;

9/4/87 CPS Worker H.V. to Ms. Bouknight and Maurice; Maurice appeared well-fed with good affect and hygiene. Service agreement discussed and signed by Ms. Bouknight.

9/8/87 In-home Aide - H.V. Saw mother and child.

9/15/87 In-home Aide - T/C from J. Bouknight stating Aide not needed today.

10/6/87 In-home Aide - T/C from J. Bouknight stating Aide not needed today.

10/13/87 In-home Aide - H.V. with mother. Child not there.

11/4/87 In-home Aide - H.V.; Saw mother who said not needed today.

11/4/87 F.C. Worker T/C from client and attempted H.V. Ms. Bouknight called and said she had a problem and requested a home visit. She said she knew she had to move in November but she will be moving today as soon as she gets her check. I told her I would be closing her case and that she has a P.S. worker but that I would come out. When I arrived, I was told that her grandfather had just taken her over to Apple's house. He said that he

does not like the people she associates with and that one of them stole his T.V. Grandfather's name is John Brown.

11/10/87 In-home Aide - unable to keep scheduled home visit with client.

11/17/87 In-home Aide - Attempted H.V. - no one responded.

11/24/87 In-home Aide - Attempted H.V. - no one responded.

11/25/87 CPS Worker - Attempted H.V. - no one responded.

12/1/87 CPS Worker - Sent appointment letter to schedule H.V. on 12/7/87.

12/7/87 Attempted T/C Contact. CPS Worker unable to keep appointment due to emergency in another case.

12/7/87 CPS worker - T/C contact with F.C. Worker; client reportedly has moved.

12/8/87 In-home Aide - Home Visit with mother; child was not there. Client stated she had moved to another residence and would call. Planned to go shopping next week.

12/10/87 In-home Aide - T/C - child answered the phone and said Ms. Bouknight had just left.

12/14/87 In-home Aide -T/C with Ms. Bouknight. The Aide wanted to schedule a home visit for 12/15/87. Ms. Bouknight declined saying she was planning to see Maurice's father. The Aide had gifts for Ms. Bouknight and Maurice. Ms. Bouknight said she would call and tell her where to bring the gifts.

12/18/87* In-home Aide T/C with Ms. Brown. Was told Ms. Bouknight did not live there anymore.

3/22/88 Informed by D.S.S./P.S. worker, Angela Collins (paternal relative) that Terrance Miles, father, has been shot to death on 3/11/88 at Washington and Lanvale Streets. Both parents alleged to be drug abusers. Ms. Bouknight reported to be wandering about in a daze since the death of Mr. Miles.

All additional contacts were by CPS Worker.

*12/23/87 Attempted H/V by CPS Worker - no response.

2/5/88 Master File Clearance - attempt to locate new address. Old address still listed.

3/23/88 Emergency HV to Ms. Jacqueline Bouknight at 9 a.m. Ms. Bouknight not home. Worker spoke to former foster father of Ms. Bouknight, Mr. John Brown (DOB 5/3/16, SS#249-14-5253), who indicated that he was the principal tenant of 1726 N. Washington Street and that Ms. Bouknight and Maurice were in residence at his home and that he saw Ms. Bouknight and Maurice that morning around 9 a.m. and that both were in good health. Mr. Brown confirmed that Ms. Bouknight was in a daze after the shooting death of Terrance Miles but that she was better and that he would not permit any harm to come to Maurice and that he had been helping Ms. Bouknight with parenting skills.

3/23/88 T/C to Foster Care Worker, Nancy Weaver; was referral source for Ms. Bouknight to Infant Study Program at U of Md. Hospital. Ms. Bouknight had 3 appointments in July and August, 1987. MA to provide transportation to and from hospital.

3/23/88 T/C to Ella Smith of Medical Records of Francis Scott Key Hospital; last appointment for Maurice 5/22/87, check-up, no special concerns noted. Appointment scheduled 9/9/87, no show.

3/23/88 T/C to U of Md. Hospital Infant Study Program, Director, Ms. Gundy (328-6975 or 828-2485 and 828-2750)

3/23/88 T/C to Ms. Barbara McGhee, Intake Specialist, U of Md. Infant Study Program (328-2485)

3/23/88 T/C to Ms. Rose Blum, Secretary, Family & Children's Society; no recent contact by Ms. Bouknight. Counselors, Leslie Morris and Carol Hubbard have left. Case closed on 7/31/87.

3/23/88 AMF clearance on Ms. Bouknight; current address for AFDC grant - 1726 N. Washington Street.

3/23/88 AMF clearance on paternal grandmother, Ms. Florence Dea no current 30 case.

3/23/88 AMF clearance on Terrance M. Miles; last home address - 2250 Gable Avenue, SS#214-76-8970, food stamp case - 30-635 304, case closed 11/1/87.

3/31/88 T/C to Ms. Jacqueline Bouknight (327-8873); no answer.

4/7/88 Unannounced HV to Ms. Bouknight at 1726 N. Washington Street; Ms. Bouknight stated that she was only visiting 1726 N. Washington Street, but that 1726 N. Washington Street was not her current address. Ms. Bouknight would not disclose her current address to worker. Ms. Bouknight would not

disclose whereabout of Maurice to worker, even though informed that worker was responsible to court for Maurice.

Ms. Bouknight stated that Maurice is with an aunt, whose name she would not disclose. Ms. Bouknight stated that Maurice was in Baltimore in her care. Ms. Bouknight stated that Maurice was seen at Francis Scott Key Hospital but would not state when. Ms. Bouknight stated she was seeing another counselor but would not disclose her counselor's name or the agency that her counselor was affiliated with.

Ms. Bouknight would not sign service agreement. Ms. Bouknight stated that she didn't care if the court was petitioned as she was not following the provisions of the Order of Protective Supervision. Ms. Bouknight stated that she would get physically violent if her AFDC grant were suspended in the office of Social Services, as the worker explained that income could not go out to a child whose whereabouts were unknown. When questioned why she would not let worker see Maurice or know of his whereabouts, Ms. Bouknight stated, "Social Services likes snatching people's children." That she was tired of being investigated and that I would never see them (meaning Ms. Bouknight and Maurice) again.

4/7/88 Conference with PS Unit Head, Leslie Ogungbemi, who concurred with worker's plan to file emergency court petition and to contact every known relative.

4/7/88 Emergency court review petition filed with Legal Resources person, Fran Burns.

4/7/88 T/C to Ms. Edna Gardner of Chesapeake Health Plan at the FSKH; last appointment by Maurice, 5/22/87; appointment scheduled in September, no show. May have been seen at Garwyn Medical Center (550-0100 or 550-3484).

4/7/88 Unannounced HV to former address of Terrence Miles at 1623 N. Durham Street; message left; no one home.

4/7/88 T/C to Parent Aide Supervisor, Ms. Gloria Dixon (X2076) to forward parent aide report

4/7/88 Attempted t/c to Parent Aide,Joanne Dix (X2075); message left.

4/7/88 T/C to Garwyn Medical Center (945-2200) at 2300 Garrison Boulevard, Baltimore 21216; Ms. Janice Thomas stated Maurice may have been seen by Dr. Francis or Dr. Clinton or Dr. Eric White (624-7800 or 563-4761) at 5240 Old Town Mall.

4/7/88 T/C to Ms. Kathy Ruzin, of Francis Scott Key Hospital; Maurice last seen 8/30/87 for check-up in the ER.

4/7/88 Attempted t/c to Dr. Timothy Doran (550-0967)

4/7/88 Attempted t/c to Dr. Steven Cohen (955-6070)

4/7/88 Attempted t/c to Dr. Patricia Shearer of JHH (342-7300)

4/7/88 T/C to JHH Social Worker, Rose Cariddi (955-8103); last contact with Maurice in 4/87.

4/7/88- T/C to Ms. Florence Dean (675-2683); last saw Maurice in 9/87. Her son, Terrance

Miles, was in North Carolina. Ms. Dean confirmed that her son, Terrance Miles, was shot to death on 3/11/88.

4/8/88 T/C to Parent Aide Supervisor, Gloria Dixon; Ms. Bouknight had been addressed before Thanksgiving. Case closed. Parent aide saw Ms. Bouknight in October and November, 1987. Went shopping with Ms. Bouknight. Ms. Bouknight first refused parent aide.

4/8/88 HV to Ms. Lillie Mae Bouknight at 5116 Queensberry Avenue; message left regarding worker's concern abut Maurice.

4/8/88 Attempted HV to Andrea Miles at 1450 Montpelier Street (243-8934); no answer; no doorbell or mail box.

4/8/88 T/C to Ms. Florence Dean at 675-2683 and 522-2100; no new information regarding Maurice.

4/8/88 T/C to maternal uncle, Charles Bouknight, at Traveler's Aid (685-3569); Mr. Bouknight had seen Ms. Bouknight recently. Would not disclose information including his own address to worker.

4/8/88 HV to 1307 N. Dallas Street, former address of Mr. Charles Bouknight; worker spoke to a Mr. Lee.

4/8/88 Attempted HV to Ms. Geneva McNeil at 1615 Biddle Street (243-8934); no answer.

4/8/88 Attempted HV to last AMF address for Mr. Miles - 2250 Gable Avenue; no such address.

4/11/88 T/C to Ms. Bouknight; not available; Maurice not with her (327-8873).

4/12/88 T/C to Ms. Bouknight; would not schedule time when worker could see Maurice.

4/12/88 AT 4 p.m., worker advised by PS Supervisor, James Ko, to file missing person's report with police.

4/12/88 Missing person's report or police report filed with Officer Charles Klein of Eastern District (396-2433) at 4:30 p.m. at 312 E. Oliver Street. Officer to go directly to Ms. Bouknight's address at 1726 N. Washington Street.

4/12/88 T/C to Ms. Lillie Mae Bouknight, paternal grandmother, 5116 Queensberry Avenue (466-4904); Ms. Lillie Mae Bouknight saw Maurice once in 10/86; has had no contact with Ms. Jacqueline Bouknight. No relative that she knew of in North Carolina but in South Carolina. Father, Charles Bouknight, in South Carolina. Maurice had 2 aunts, but Ms. Lillie Bouknight was certain that Maurice is not in their care. Ms. Lillie Mae Bouknight believed further that son, Charles Bouknight, had the most information and that he lived on Monument Street, although she did not know his address. Ms. Lillie Mae Bouknight not a relative resource.

4/12/88 T/C to Mr. Charles Bouknight at Traveler's Aid (685-3569); no recent contact with Maurice; would not discuss issue; would call worker at a later date.

4/14/88 T/C to Officer Charles Klein; spoke to paternal grandmother, Ms. Florence Dean, at 1003 N. Gay Street, apt. 201 (675-2883 and 522-2100); Terrance Miles reportedly bringing child in March to Jacqueline Bouknight. Ms. Bouknight reportedly to move to North Carolina. Maurice may be in North Carolina. Officer Klein went to 4633 Reisterstown

Road to see putative aunt, Louise Perry. Given wrong number by Ms. Bouknight. Ms. Bouknight stated to Officer Klein that she worked at Dial A Mate. Officer did not believe Ms. Bouknight could get a job. Contacted Dial A Mate at 219 Joppa Road; no listing for Ms. Bouknight. No record at Baltimore G & E. Post Office to get back to Officer Klein regarding another address for Ms. Bouknight.

Officer Klein contacted a Louise Perry at 717 Druid Lake Drive, Apt. 206 (669-4519); no contact with Maurice. Stated that Ms. Bouknight lied.

4/12/88 T/C from Ms. Bouknight at 5:35 p.m. to DSS Screening Worker, Zachary Grant, regarding police visit to home.

4/13/88 T/C from Ms. Bouknight; upset regarding police visit to home. Ms. Bouknight stated Maurice in care of aunt whose name and address she would not disclose. Ms. Bouknight stated that she was going to school during the day. Ms. Bouknight would not state a time in the evening when the worker could see Maurice.

4/13/88 T/C to Officer Charles Klein at 396-2433; missing person's complaint number is 3D-26458.

4/13/88 OV with PS Unit Chief, Leslie Ogungbemi; worker directed to contact SAO. Letter to IM worker to suspend grant. Letter to Ms. Bouknight, informing her of actions taken.

4/14/88 T/C from Officer Klein

4/15/88 T/C to Charles Bouknight at Traveler's Aid (685-3569)

4/15/88 T/C from Officer Klein at 4 p.m.; Officer Klein to refer case to Homicide to Sgt. Landsmann. (396-272 Ms. Louise Perry had never seen the baby. Case looks kinky. Officer thinks Ms. Bouknight did something that has hurt Maurice.

4/15/88 4:20 office conference with PS Supervisor, Gwen Johnson police involvement sufficient. Worker can do no more at this time, including contacting SAO. Possible relative in Columbia, South Carolina and Wynnboro, South Carolina.

4/15/88 5:15 t/c to Officer Klein regarding any new information

4/15/88 T/C to Charles Bouknight (685-3569); Mr. Bouknight stated he would not disclose information but that he would phone worker in his office around 1 p.m. on 4/18/88. Mr. Bouknight had not seen Maurice.

4/17/88 T/C to Officer Klein regarding progress of case

4/18/88 Unannounced HV to Ms. Bouknight at 1726 N. Washington Street at 12 noon; Mr. John Brown stated that he and a Shirley Davis and a Remell Carter lived at 1726 N. Washington Street as well as Ms. Bouknight. Mr. Brown revised his story that he had seen Maurice on 3/23/88, to state that he had last seen Maurice one week previous to 3/23/88.

Mr. Brown stated on occasion, he put Ms. Bouknight out of his home as she allowed Mr. Terrance Miles to come into his home and steal his TV.

4/18/88 1:30, this worker surprised Ms. Jacqueline Bouknight coming into the home. Ms. Bouk-

night was in the company of a man. Stated she was enroute to pick up Maurice and to take him to Francis Scott Key Clinic, to be seen by Dr. Doran and that she would return with Maurice at 4:30 p.m. on 4/18/88 to 1726 N. Washington Street, for the worker to see Maurice. Ms. Bouknight informed of the 4/21/88 1 p.m. court hearing.

4/18/88 T/C to Sgt. Stine of the Youth Division; Sgt. Stine to have police officer meet worker at 1726 N. Washington Street at 4:30 p.m.

4/18/88 Worker flagged Baltimore City Police Officer Opher, of the Eastern District. Worker and Police Woman went to 1726 N. Washington Street. Only Mr. Brown at home. Mr. Brown stated that Ms. Bouknight but not Maurice had slept at 1726 N. Washington Street on the night of 4/17/88.

4/18/88 Alert submitted to Henry Hunt of Foster Care Intake and to Screening.

4/18/88 AMF clearance for Valerie Miles; no active case.

4/18/88 T/C to Sgt. Stine of Youth Division (396-2042); case assigned to Det. Jones.

4/18/88 T/C to Charles Bouknight (685-3569) at 10a.m. Mr. Bouknight to call worker at 1 p.m./

4/18/88 Worker waited between 1 and 2 p.m. for phone call from Mr. Charles Bouknight; no call.

4/18/88 Attempted t/c to Andrea Miles, paternal aunt, who contacted DSS Supervisor, Merle Smith, who indicated she had not seen Maurice.

4/18/88 T/C to Det. James Jones; nothing new on case. Worker suggested photograph of mother and to accompany Det. Jones. Det. Jones stated he would rely on cooperation of Ms. Bouknight. Worker emphasized the possibility of this being a murder case.

4/19/88 9 a.m. office visit by Ms. Bouknight. Ms. Bouknight questioned this worker regarding court hearing for 4/20/88. "Are they going to snatch my child?" Worker replied that it was up to court. Ms. Bouknight replied, "that's all I wanted to know." Ms. Bouknight left the office. She then returned asking for tokens to go to school. In the waiting room Ms. Bouknight stated, "I'm going to kill myself. Are you going to put that in your record?" Worker replied, yes. Ms. Bouknight stated, "I'm going to kill myself after the court hearing. I won't have any reason to live without him. I won't have any reason to live then." Ms. Bouknight appeared to be on the verge of tears and an emotional breakdown. Worker gave Ms. Bouknight one token.

4/19/88 Case conference with Supervisor, Merle Smith. Worker not obliged to transport Ms. Bouknight to mental health facility but to inform Ms. Bouknight of such resources.

4/19/88 T/C to Mr. Charles Bouknight, Sr.; M-3, West Columbia Apts., West Columbia, South Carolina (803)796-2538 at 9:20 a.m. Mr. Bouknight would not discuss Maurice with worker. Stated he did not have Maurice.

4/19/88 T/C to Charles Bouknight,Jr. (685-3569); had not seen child in a long time. Ms. Bouknight did not mention child. Mr. Bouknight believed Ms. Bouknight not capable of caring for child.

4/19/88 T/C to Det. James Jones and OV by Det. Jones

4/19/88 T/C to Charles Bouknight; address of his father and a Thomasina in North Carolina given to worker. Mr. Bouknight requested that these relatives not be contacted until after the 4/20/88 court hearing. Worker stated urgent necessity of safeguarding child and indicated that they would be contacted immediately

4/20/88 T/C to Mr. Charles Bouknight (803) 796-2538 at 11:35 and 12 noon; no answer.

4/20/88 T/C to a Thomasina (803)799-5567; a man named John B. answered; not a relative; didn't know anything, but the person, Thomasina did live at that address.

4/20/88 T/C to Parent Aide Supervisor, Gloria Dixon; message left.

4/19/88 Unannounced HV to Leslie Miles, paternal aunt, at 913 E. 30th Street; last saw Maurice at the 2000 block of Oliver and Gay Streets, in mid February, 1988.

4/20/88 Telegram sent to Thomasina Bouknight, regarding whereabouts of Maurice Miles. No personal delivery of telegrams for West Columbia or Charles Bouknight. Operator #636.

4/20/88 Emergency court review hearing. Shelter care of Maurice granted to DSS by Master Teaette Price. Present - DSS Attorney, Marilyn Blimline; child's attorney, Lisa Watts, Legal Aid attorney for Maurice, and Robin Parsons, OPD for Ms. Bouknight. Also pres-

ent. Det. James Jones of the Youth Division, docket #887042023.

4/20/88 Motion for contempt and petition for the issuance of an order to Show Cause. Court hearing before Judge Edward Angeletti. Present - Marilyn Blimline, Lisa Watts, Robin Parsons, and this worker. Det. Jones not present although informed of court hearing.

Judge Edward Angeletti (396-5074 or 396-5075) issued a Show Cause Order. Ms. Jacqueline Bouknight to answer to the court why she was not present for court hearing of 4/20/88, although had personal service and signed summons and informed by her attorney, Robin Parsons, of the time and place of court hearing.

Judge Angeletti isused a bench warrant for Ms. Bouknight and ordered that if Ms. Bouknight failed to produce child, she is to be locked up until she produces child. Warrant #16188. No bail on warrant.

Ms. Bouknight to be brought immediately before Judge Angeletti and be given an immediate psychological and psychiatric evaluation by the court medical officer, Nick Conti.

4/20/88 T/C to Det. James Jones; informed of court order. Det. Jones indicated that he had a copy of the warrant #161-88. Det. Jones reminded of life and death nature of the case.

4/20/88 Alert and copy of Order of Shelter Care given to DSS screening person, Kenny.

4/20/88 Copy of OSC added to the Foster Care Alert to Foster Care Supervisor, Henry Hunt.

4/21/88 T/C and memo to IM Supervisor, Ms. Genevieve Hicks (X3282) at Collington Square, to suspend AFDC grant of Ms. Bouknight and to alert her and district regarding Maurice. Copy of memo also sent to IM Worker, Ms. A. Johnson (X3257).

4/21/88 T/C to Sgt. Stine of Youth Division; Det. Jones had spoken to a Sheila Davis at 1729 N. Washington Street who stated to Det. Jones that she had seen Maurice with Ms. Bouknight on that day.

4/21/88 T/C to Det. James Jones; Det. Jones advised that case should be regarded as a homicide and that no responsible employee of city or hospital had seen the child.

4/21/88 T/C to Sgt. Stine of the Youth Division; Det. Jones looking for Ms. Bouknight at that moment.

4/22/88 9a.m. t/c to Det. Jones

4/22/88 T/C to court clerk for Judge Angeletti; Eric McDonald worker quoted Det. James Jones, "that mother is going to have to help us." Worker suggested someone from Judge Angeletti's court to impress upon police the severity of the case, that Ms. Bouknight, according to Mr. Brown, did not stay at 1726 N. Washington Street on the night of 4/21/88.

4/22/88 T/C to Det. Jones, who spoke to a Ms. Sophronia Washington, niece of Mr. Brown, at 1726 N. Washington Street, on 4/21/88. Detective did not request photos of mother and child or want worker to accompany him to home as he had never seen Ms. Bouknight.

4/22/88	T/C to Ms. Cindy Mrozek, clerk to Judge Angeletti; same concern related.
4/22/88	3 p.m. t/c to Judge Edward Angeletti; Judge Angeletti suggested that either worker or police wait surceptiously outside the home at 1726 N. Washington Street.
4/22/88	T/C to PS Supervisor, Merle Smith; Ms. Smith stated waiting outside home not a PS worker's function. Worker had done all he could do.
4/22/88	4:30 unannounced HV to 1726 N. Washington Street; worker spoke with a Norma Begett, age 20, 718 N. Bradford Street, no phone. Stated to this worker that she had seen Ms. Jacqueline Bouknight around 1:30 p.m. by herself. Ms. Begett had no contact with Maurice.
4/22/88	Unannounced HV to Arthur Haynes at 1729 N. Washington Street regarding Ms. Bouknight and Maurice; Mr. Haynes stated he had not seen Maurice recently.
4/22/88	T/C to Officer Klein regarding Ms. Bouknight; seen at 1726 N. Washington Street.
4/25/88	T/C to Det. Jones.
4/25/88	T/C from Det. Celio Olivares of the Youth Section to give case close scrutiny.
4/25/88	Attempted t/c to Officer Klein
4/25/88	T/C to Lt. Sweeney of Homicide
4/25/88	T/C to Sgt. Harding, Shift Commander at Eastern Dist. to send an officer to 1726 N. Washington Street at night.
4/25/88	T/C to Ms. Hicks regarding suspension of AFDC memo

4/25/88	T/C from Det. Olivares; in need of photograph of Ms. Bouknight.
4/25/88	T/C to Ms. Hicks of Collington Square; permissible for police to pick up photo.
4/25/88	T/C from Ms. Hicks; instructed by District Manager, Thomas Piscitelli that photo ID of Ms. Bouknight can only be issued to worker or DSS personnel.
4/25/88	Visit to Collington Square District to Ms. Hicks; photo given to worker who gave photo to Det. Olivares and Jones.
4/26/88	T/C to Shift Commander, Sgt. Harding; Officer Klein went to 1726 N. Washington Street. Ms. Bouknight not there. To have another officer try again on night of 4/26/88.
4/26/88	T/C with Dot Rosinski, Chief of PS; Dot Rosinski to contact Youth Division of BCP on morning of 4/27/88, to request that greatest attention be given to the matter as it is a possible homicide.
4/27/88	T/C from Lt. Kibler of the Youth Divison (396-2042); Ms. Bouknight in police custody. Alert for child. During questioning, Ms. Bouknight mentioned the name of Michelle Jones in Lexington County, South Carolina.
4/27/88	T/C to Ms. Jeanette Scott, Executive Support Assistant Division of Child Protective and Preventive Services; Columbia, South Carolina (803) 734-5670.
	Ms. Scott to check out Thomasina (Brunson) Z-2 Allen Benedict Court, Columbia, S.C. (803) 799-5567. and Charles Bouknight, Sr., M-3 West Columbia, South Carolina (803)

796-2538 and a Michelle Jones in Lexington County, South Carolina.

4/27/88 9 p.m. home t/c from DSS attorney, Marilyn Blimline Court orders of Judge Angeletti not signed. Court hearing to be continued on 4/28/88. Address proffered by Ms. Bouknight regarding a Barbara Bouknight. Initially information forwarded to Marilyn Blimline, indicated no such address.

4/27/88 T/C to Sgt. Caprinollo, of the women's lock-up in Central; warned about Ms. Bouknight's suicidal statements. Ms. Bouknight placed in a special cell.

4/28/88 Attempted t/c to Ms. Jeanette Scott, DSS in Columbia, South Carolina (803) 734-6182. Worker spoke to Jeanette Diaz regarding information and investigation request by Baltimore City Police and DSS of the above mentioned addresses as possibilities regarding Maurice's whereabouts.

4/28/88 T/C from PS Worker, Ms. Margaret Hopkins, from the Richland County DSS in Columbia, South Carolina.

On 4/27/88, Ms. Hopkins made a HV to Z-2 Allen Benedic Court, home of Mr. and Mrs. Johnny and Thomasina Brunson. Maurice not in their home. Ms. Hopkins also checked medical records at the Richland Memorial Hospital and DSS records for both Ms. Bouknight and Maurice Miles for food stamps, AFDC or medical assistance. No record.

Mr. and Mrs. Brunson knew Mr. Charles Bouknight, Sr. and although they are no relatives, Mr. Charles Bouknight addresses Mrs.

Thomasina Brunson as aunt. Mrs. Brunson did not believe that Mr. Bouknight, Sr. was caring for Maurice.

Address of Ms. Margaret Hopkins - Richland County DSS
Child Protective Services
2020 Hampton Street
Columbia, South Carolina 29204
Telephone # (area code 803) 256-4200, X105.

Ms. Hopkins did not have information regarding putative relatives in Lexington County.

4/28/88 T/C to Ms. Janet Diaz, Program Director, Child Protective and Preventive Services (803) 734-5670. Ms. Diaz to contact Ms. Jeanette Scott regarding the two workers sent out on 4/27/88 regarding both addresses.

4/28/88 T/C to Parent Aide Supervisor, Gloria Dixon, and Parent Aide, Joanne Dix; message left.

4/28/88 Interview by Det. Shawn Dashiell of the Youth Section at Central District regarding case record information.

4/28/88 Motion for contempt and show cause for non-appearance on 4/20 and the non-production of child court hearing before Judge David B. Mitchell. Ms. Bouknight found in contempt and to be incarcerated until she purges her contempt by disclosing the whereabouts of her son, Maurice.

Present were DSS attorney, Marilyn Blimline; Legal Aid attorney for Maurice, Lisa Watts; Office of Public Defender attorney, Robin Parsons; Det. Shawn Dashiell of Youth Division, BCP; and Ms. Bouknight.

Also on 4/28/88, Jacqueline Bouknight was given an emergency evaluation for competency and dangerousness. Petition #88704202 by Jonas A. Rappaport, Chief Medical Officer of the Medical Services of the Circuit Court for Baltimore City (396-5013), and it was found by Dr. Rappaport that Ms. Bouknight understands the nature and consequences of the charges against her and is able to assist her attorney in her defense. It was further stated that Ms. Bouknight is not currently dangerous to herself or the person or property of others. Ms. Bouknight was diagnosed as being a very angry, negativistic type of individual who frequently misunderstands what others are about and easily becomes involved in power struggles.

Ms. Bouknight stated that Maurice is with her sister at 3417 Denton Avenue, Dallas, Texas.

On 4/28/88, Lt. Kibler informed Det. Shawn Dashiell that a Barbara Bouknight did live at that address but that she had never seen Maurice other than a photograph of him when he was first born.

5/4/88 T/C from Detective James Jones of the Youth Section, Baltimore City Police, 396-2042. Detective Jones requesting worker to meet with Detective Richard Falhteich of Homicide Division of Baltimore City Police (9:50 a.m.)

5/4/88 11:00 a.m. - Interview of worker by Detective Richard Fahlteich of Homicide, Baltimore City Police at 500 East Baltimore Street, 396-2721.

5/5/88 Detective Dashiell indicates that Charles Bouknight, Sr., M-3 West Columbia Apart-

ments, West Columbia, South Carolina, (AC 803) 796-2438, and that the response was negative that Mr. Bouknight did now know of Maurice's whereabouts. Detective Dashiell indicated that Police were checking out fourteen different individuals with the name of Bouknight in South Carolina.

PROGRESS REPORT
CHILD IN PLACEMENT OR COURT ORDERED
PROTECTIVE SUPERVISION

Date: May 13, 1988

For Period From: August 18, 1987 to May 5, 1988

(Child's Name) Maurice L. M
(DOB) 10/3/86
(Date of Court Order) 8-18-87

Type of Court Order: Order of Protective Supervision

MOTHER: Jacqueline L. Bouknight
ADDRESS: 1726 N. Washington Street
(Presently incarcerated)

FATHER: Terrence M. Miles
ADDRESS: (deceased as of 3/11/88)

1. Reason for placement. When and why child came into care.

   Child Protective Service investigation initiated on 1/23/87 substantiated physical abuse and neglect. Maurice had suffered severe physical injuries while in the care of his mother.

2. Present placement. When it began. Adjustment of child.

   Maurice was placed in Foster Care from 2/10/87 until 7/17/87. Maurice was ordered returned to the care of his mother by the Court on 7/17/87.

3. Agency contacts since last report. Dates and types of contacts. With whom and where.

   See attached contact listings that combines contact by Foster Care, Child Protective Services and In-home Aide Services dating from the dispositional decision on 8-18-87.

4. Health (last medical exam., type of treatment and *where*, including medication, further needs).

   On 7/17/87, Maurice received a medical examination at Chesapeake Health Plan upon his exit from Foster Care. Maurice had some problems with his ear due to teething, and had a cold. A prescription was provided.

   On 8/30/87, Maurice was seen at Francis Scott Key Emergency Room due to a high temperature. Prescription given. Mother filled prescription on 8/31/87 with assistance of Foster Care worker. No known subsequent medical appointments.

5. School progress—grade, type of school and adjustment.

   NOT APPLICABLE

6. Description of contacts between natural family and child. (Dates, with whom, purpose.)

   SEE ATTACHED CONTACT LISTING.

7. Service plan for child's family. (What are the objectives agreed upon between relative and worker and what activities are needed to reach the objective/goal.)

   Maurice M s' current whereabouts are unknown. His mother, Jacqueline Bouknight, has refused to disclose his whereabouts and has been found in contempt of court. Ms. Bouknight has been incarcerated since 4/26/88.

8. Financial support by child's parents.
   ☐ Supporting ☐ Not Supporting

   AFDC-FC Status

   ☐ Eligible ☐ Ineligible

9. Other problems and/or comments.

10. Direction indicated for child.

    Every effort is being made by the Baltimore City Police Department and Baltimore City Department

of Social Services to locate Maurice Miles. D.S.S. is requesting that Maurice be committed to the Department and placed in Foster Care as soon as he is found.

Prepared By: Phil Maguire /s/Philip Maguire
Date: 5-13-88

Social Services Center: Child Protective Services
Phone No.: 361-2438

Supervisor's Signature: Merle Smith /s/ Merle Smith 5/17/88
Phone No.: 361-2108

DUE DATE—Next Reconsideration/Court Report: To be determined by the Court

CIRCUIT COURT FOR BALTIMORE CITY

MAY 18, 1988

[Title omitted in printing]

PROCEEDINGS

[2] MS. BRIMLINE: Your Honor, the Department would call the case of Maurice Lorenzo M Docket Number 887420. Marilyn Brimline representing the Baltimore City Department of Social Services.

MS. WATTS: Lisa Watts, Legal Aid Bureau, representing the Respndent along with Mitchell Mervis.

MS. LIPMAN: Your Honor, George Lipman and Robin Parsons representing Miss Bouknight.

We have a preliminary matter.

THE COURT: This is the time.

MR. LIPMAN: If Your Honor please, at a prior hearing, I understand from Ms. Parsons, she asserted the Fifth Amendment right against self-incrimination and Article 22 of the Maryland Declaration of Rights regarding the right against self-incrimination on behalf of Miss Bouknight. We are very adamantly asserting those rights here again today.

If Your Honor please, our position is that this contempt proceeding cannot continue. The contempt situation cannot continue because Miss Bouknight is being held because she is [3] refusing to give up her Fifth Amendment rights against self-incrimination. That's our first preliminary matter.

Our second preliminary matter for the record is we want to assert the Sixth Amendment right to counsel in questioning and the Fifth Amendment. If Your Honor please, I would proffer that in indicating to the State's Attorney's Office, Mr. Glushakow, who is with the Violent Crimes

Unit of that office and who is in court today, and Mr. Cohen from the Juvenile Division of the State's Attorney's Office who is also in court today, we had a discussion approximately a half hour ago where to my surprise I saw my client in the library of the Violent Crimes Unit on the third floor of this courthouse in the company of the detective.

Your Honor, at that point, I said to Mr. Glushakow and to Mr. Cohen and to the detective that we were asserting the Sixth Amendment right, and we did not want anyone talking to our client because we were representing her, we meaning Robin Parsons and George Limpan of the Office of the Public Defender.

So, Your Honor, we wish now to raise [4] both the fifth and Sixth Amendment rights and we would like to present some testimony as to that, move for Your Honor to strike the contempt order and free Miss Bouknight from jail, and we want a record here which I think we just made that we are asserting our Sixth Amendment rights to the Baltimore City Police Department and the other Police Department and State's Attorney for Baltimore City that we are representing her and we do not want her talked to by any law enforcement officials without our being present. And Your Honor, I would like to, if Your Honor please, it is quite elaborate, our motion on the Fifth Amendment.

There are a lot of federal cases, state cases, and a proffer we wish to make in this matter. And I guess we're asking the Court's guidance when we should do that, if we should do that now or if Your Honor would want a written memorandum from us in a couple of days or how Your Honor wishes to handle it. We are prepared to orally make that motion today.

We have a proffer ready regarding that, and we have a pile of cases and their citations. I apologize to the Court, we have not had an [5] opportunity to write a brief memo at this point.

THE COURT: There are several issues that you present and some of which come into direct conflict with the base of authority with this court and its previously issued orders. This child was placed with the mother on the order of protective supervision. This court has jurisdiction to require at all times to know the whereabouts of the minor child. We asserted jurisdiction over that child in the spring of 1987 at the time of a hearing on an allegation brought by Baltimore City Department of Social Services that Maurice was a Child in Need of Assistance.

This court did render a finding that the child was indeed one who was in need of assistance of the Court, and we took jurisdiction over his well-being. The decision made by the Court in concert with that, with the parties, was to place the child in the home of its mother under continuing authority of the Courts. It has been brought to the Court's attention that the child's whereabouts are unknown.

This is a child under whom the Court has asserted jurisdiction. We are inquiring of the whereabouts of this child. We still are [6] inquiring of the whereabouts of this child as of the moment. That inquiry is very valid. The proceedings have several complexions to them. One is to continue the opportunity afforded to Miss Bouknight to purge herself of the contempt of this court for failing to comply with the previously issued order of advising this court of the whereabouts of her child.

She asserts her Fifth Amendment right and if she does do that, that is perfectly permissible and proper. This court is always going to be available to protect her rights in that regard.

A decision on her part to do that is individual in nature. The Court is in no way compelling her to do anything with regard to the decision on her Fifth Amendment rights. Clearly, however, we have an interest in locating this child. However that is done, we will accept the information. She, however, does stand in contempt of this court for failing

to produce a child that was placed in her custody and under her control. She does not have to speak. The child, however, is under an order of this court validly issued.

Now, if you want to have testimony [7] presented in support of your motion, that's find and we will take that testimony. Of course, we will permit you the opportunity to produce your record. That, however, is only a portion of the proceedings that we are going to engage in today. Other portions of today's proceedings include a review of this case. On April 28, 1988, this court scheduled this matter for a review on today's date at 9 a.m.

The purpose of that review was to discuss the status of the child and any care that was rendered to the child. This hearing necessarily encompasses the mother if she wishes to participate. The opportunity is afforded her. She is only a portion of the parties' involvement in these proceedings.

The Court would like them to discuss the agency's handling of the child. If you want the opportunity to submit a memoranda, from all of the attorneys on the issue that you raise, the Court will give you that opportunity.

You asserted here today on the record Sixth Amendment rights for your client. You have in court a representative of the Baltimore City Police Department, and we have also the State's [8] Attorney's Office in the person of Mr. Glushakow and Mr. Cohen.

I am sure they heard your assertion. They are involved with the police in many capacities. They will transmit the message. If you wish, the forum is available to you, sir. We will allow you to take whatever testimony or make whatever proffer you wish to make. If you want to supplement that by a written motion along with memoranda, you may do so. We will then have to discuss a schedule to allow counsel for the other parties to participate in any response.

The State's Attorney's Office is not a party to these proceedings. The State's Attorney's Office if anything is an observer in these proceedings. They may request participation as a party or at least as a friend of the Court. They have not done so. We will have to cross that bridge if in fact we have to approach it. Does anyone have any comment they wish to make before we permit Mr. Lipman and Mrs. Parsons the opportunity to make their record?

MS. BRIMLINE: No, Your Honor. Per Your Honor, as counsel for the child, we would be happy to submit a memoranda and a response to the [9] presentation that Mr. Lipman is making today.

THE COURT: All right. Mr. Lipman, the forum is yours.

MR. LIPMAN: Thank you, sir. If Your Honor please, I would like to, I guess, make a first comment about Your Honor's statement, then proceed. First of all, Your Honor, it is our position that there can't be a line drawn between her producing the child, her giving statements to any person, as to the whereabouts of any child without being in the middle of the Fifth Amendment.

We also call to the Court's attention that the Fifth Amendment is absolute. There is no balancing between the State's interest and the Fifth Amendment, that it is an absolute right. And Your Honor—

THE COURT: Mr. Lipman, doesn't she place herself on the horns of a dilemma?

MR. LIPMAN: No, Your Honor, she does not place herself on the horns of a dilemma. I would say the State is on the horns of a dilemma. If they wish to get statements from her, as I would go on a little further, they could offer her complete immunity from any prosecution. That is [10] the standard in which it is done. If they don't, the essence of the contempt, the substance of the contempt is that she must verbally or physically produce statements or evidence that may tend to incriminate her.

If Your Honor please, we are not in any way suggesting that she is guilty of anything, simply call to the Court's attention the case of Slochower v. Board of Higher Education for the City of New York which is 350 U.S. 551, 100 Lawyers Edition 692, 1951 at page 700 where it simply says, "The privilege against self-incrimination will be reduced to a hollow mockery if its exercise is taken as the equivalent of either a confession of guilt or a conclusion of presumptive punery."

As we point out, the witness may have a reasonable fear of prosecution, yet produce any wrongdoing. The privilege will protect the innocent which might otherwise be ensnared by any circumstances. If Your Honor please, that is where we think we are right now.

If Your Honor please, we will give a memorandum to Your Honor, we have seven cases which we have shared with the State and—

[11] THE COURT: Looks like you are sharing them now.

MR. LIPMAN: Well, I am sharing them now with the State's Attorney and the person from Department of Social Services now and with counsel for the child which are preliminary research in this matter, and we are continuing it. I could share it with the Court too if I don't run out of copies here.

Your Honor, as we look at Richardson v. State, which is a Maryland case, 285 Maryland 269, and Smith v. State, 283 Maryland 187, in those cases is the sort of Hornbook law that I think governs the situation here. That Hornbook law, of course, is that the Fifth Amendment applies in any kind of proceeding, not just a criminal proceeding, an administrative proceeding, civil proceeding, any type of proceeding where to quote Richardson at 268, "Where it is not therefore perfectly clear that the appellant's answers could not possibly have a tendency to incriminate him."

Your Honor, I would submit the standard is very, very low for any court's review of whether the Fifth Amendment is asserted properly and it is simply that it must be perfectly clear [12] to the defendant that anything they say could not possibly incriminate them.

Your Honor, we think that it is perfectly clear from the circumstances surrounding this whole event that there is every possibility that any statement she may make may incriminate her. That language comes from the similar case in the area, Hoffman, which I gave to Your Honor, which is the clear case of there being no need for there to be a pending prosecution, an actual indictment, anything like that, to evoke the Fifth Amendment, only that there may be some nexus to a hazard that the defendant reasonably apprehends, that there, the actual language, the reasonable cause to apprehend danger from an answer. That if anything would furnish a link in the chain towards a potential prosecution.

If Your Honor please, that is the situation that we find ourselves in right now. Further, in Hoffman and annotations that accompany that cite, it is very clear that the Court in assessing whether or not it is a reasonable assertion of the Fifth Amendment, need not take actual testimony or need not have a burden of proof in a similar criminal case but rather, on [13] its own, look throughout the circumstances of the event to see if this is a reasonable decision with some possibility of incriminating himself by the client asserting the Fifth Amendment rights.

If Your Honor please, in that regard, Mrs. Parsons and I have prepared a proffer for today as to some of the circumstances surrounding this case, and we sort of divided it into two parts with Mrs. Parsons speaking regarding the, some of the juvenile matters that took place and myself talking about some of the aspects of the contempt petition. In that regard—

THE COURT: You propose to present no testimony?

MR. LIPMAN: Your Honor, at this point, we propose to introduce into evidence certain documents. We propose at this point to proffer through both Mrs. Parsons and myself statements in those places of evidence. We propose to discuss and call the Court's attention, if you will, to certain aspects of the case which are self-evident. And then, Your Honor, we'd like to reserve the possibility of a future hearing within the next two, three days to supplement that proffer with any further evidence that is related [14] to those pieces so we have a record in this matter.

THE COURT: Let's proceed with what proffer you wish to make.

MR. LIPMAN: If Your Honor please—

MS. BRIMLINE: Your Honor, I would assume since they are proceeding by proffer, they would have no objection to our proceeding by proffer also. Is that correct.

THE COURT: Have you all discussed the proposed evidence?

MR. LIPMAN: No, Your Honor, we have not had a chance to discuss it.

THE COURT: Why don't you discuss this evidence. That way, we can see if there is any objection to the proffer.

MS. PARSONS: Your Honor, the evidence that we are proposing is, I believe, already entirely part of the file.

THE COURT: That might be true, but you ought to give them the opportunity to see the information in advance to its presentation to the Court. You may want to step outside for a few moments. Do you have written documents?

MS. PARSONS: We have copies of the [15] documents we are going to refer to.

THE COURT: Show all that to the attorneys as well. Why don't you step outside and discuss these issues.

(Recess)

THE COURT: You now have had the opportunity to discuss this matter among yourselves?

MS. LIPMAN: Yes, Your Honor, we have.

THE COURT: Is the proffer going to be presented?

MS. LIPMAN: Yes, sir, it is.

THE COURT: Is that agreed to by the parties?

MS. BRIMLINE: If my understanding of the proffer is correct, it is agreeable to the Department.

THE COURT: If there is an incorrect understanding, I'm sure you will step forward.

MS. BRIMLINE: Yes, Your Honor.

THE COURT: Mr. Mervis or Miss Watts, is it same for you?

MR. MERVIS: Yes.

THE COURT: All right. Proceed.

MR. LIPMAN: Thank you, Your Honor. If [16] Your Honor please, our first proffer, and I am using the term proffer in terms of a stipulation—

(Discussion off the record.)

MR. LIPMAN: Your Honor, let me back up one second and give my own definition of the word proffer. If Your Honor please, we understand we are here making an assertion of the Fifth Amendment and Article 22 of the Declaration of Rights on behalf of our client.

We intend that assertion and argue that assertion precludes the Court from continuing the contempt in this case. We are offering these statements that we will make, stipulations, and these documents that we will introduce as evidence as to the reasonableness of our assertion of the

Fifth Amendment rights and Article 22 of the Maryland Declaration of Rights. I just wanted to make it crystal clear what we were attempting to do at this point by offering these statements and these documents.

Our first stipulation, if you will, or proffer, is that as of 2:45 today, all counsel spoke with Michael Glushakow who is a senior Assistant State's Attorney in the Baltimore City [17] State's Attorney's Office and is assigned to the Violent Crimes Division of that office. That the Violent Crimes Division of the State's Attorney's Office is the office which assists the police in the investigation of violent crimes, murders, and other violent crimes and of course prosecutes some of those cases. That Mr. Glushakow indicated that he would not at this time offer immunity to Miss Bouknight. Whether that is called transactional immunity, use immunity or derivative immunity and that it is the position of the Baltimore State's Attorney's Office at this time is they would not offer immunity of Miss Bouknight from any future prosecution. That we understand is stipulated between the parties.

The second request is that on this motion, you take into consideration the testimony that took place on Friday, the 13th, last Friday in this courtroom.

THE COURT: That was the testimony presented by a sergeant of the Baltimore City Police?

MS. LIPMAN: Yes, Sergeant Robert Dean, it is my understanding, is the police officer, and the entire testimony of Sergeant Dean in this [18] matter. Your Honor, we would then introduce and we have given copies as Miss Bouknight's Exhibit 1 in this matter the juvenile petition dated 11-12-87, petition 87804202, which we understand is also of course in this court record now, but we would introduce it as Defendant's Exhibit 1 for this motion, a Stipulation, which is simply entitled stipulation which we understand is the stipulation dated 5-19-87 in this case as it first appeared in juvenile court.

The second stipulation dated 8-18-87 with the same case number is our next exhibit. The motion for contempt and petition for issuance of an order of show cause which is, I do not have the date, but it is petition for contempt that has caused this contempt action to take place filed by the Department of Social Services.

A report of April 28, 1988 by Jonas Rappaport, chief medical officer of the Circuit Court for Baltimore City, the police flier which I think was Exhibit 1 on the hearing of last Friday which is the missing persons flier on Maurice Miles is our next exhibit if Your Honor please.

We have as our next exhibit and is the [19] agreed between the parties the entire record, not just the three pages that we will give to Your Honor, be admitted into evidence, and we have no objection to that. But what we have xeroxed now is three pages, pages six, seven, and nine of a progress report in this case authored by a Department of Social Services social worker.

MS. BRIMLINE: I would just say the Department has submitted that full report to the Court and there should be a copy in the court record which will take care of the xeroxed copy.

THE COURT: There is a report in here dated May 13, 1988.

MS. BRIMLINE: Yes, Your Honor.

MR. LIPMAN: That is the correct report, Your Honor.

THE COURT: It is twelve pages in length?

MS. LIPMAN: That's our understanding, Your Honor.

MS. BRIMLINE: Yes, Your Honor.

THE COURT: We'll have the original report in the Court file and we'll mark that as Mother's Exhibit No. 7.

MR. LIPMAN: And, Your Honor, as Miss [20] Bouknight's Exhibit No. 8, an article from the Baltimore Sun-

papers which is not dated but we would proffer to the Court was from Thursday, May 12, the Sunpapers, the morning Sunpapers, if Your Honor please. And we will ask regarding those articles that we be allowed to supplement the record with further newspaper articles which, unfortunately, just this morning, we didn't have available for xeroxing. But there are other newspaper and press article that we wish to supplement the record with. And further, Your Honor, we may ask to submit more evidence, but at this point, that is our proffered document.

THE COURT: Is this proffer agreed to by the parties?

MS. BRIMLINE: Yes, Your Honor, but I think there is a date wrong in terms of the newspaper article. I just looked very quickly at it, but I thought it was the one.

MR. LIPMAN: It is not well xeroxed, Your Honor.

MS. BRIMLINE: This is from May 16th.

MR. LIPMAN: I stand corrected, Your Honor.

MS. BRIMLINE: And I believe it is the [21] Evening Sunpaper.

THE COURT: Stipulated to by the attorneys for the Respondent?

MR. MERVIS: Yes, it is, Your Honor.

THE COURT: Proceed, Mr. Lipman.

MR. LIPMAN: Yes, Your Honor.

MS. BRIMLINE: Excuse me, Your Honor, the only thing I would have a problem with in terms of this proffer is future newspaper articles which there is no way of knowing in advance what they may or may not say.

THE COURT: We will have to consider those as the issue arises.

MS. BRIMLINE: Thank you, Your Honor.

MR. LIPMAN: If Your Honor please, in terms of the particular documents, I would ask at this time if Mrs. Parsons could or would be allowed to list to the Court various pieces of some of those documents which we find particularly relevant to this motion and call to the Court's attention.

THE COURT: Mr. Lipman, I do not want to interfere with anything that you are trying to do. But what you want the record to show is that your client is being required or asked to tell where [22] the whereabouts of her son.

MR. LIPMAN: That's correct.

THE COURT: She asserts her Fifth Amendment rights and also the rights guaranteed to her by the Maryland Declaration of Rights to not be required to give any comment, either oral or through a nonverbal communication—

MR. LIPMAN: That's correct.

THE COURT: —that would in any way incriminate her. She does not assert she has committed a crime, but she still stands on the rights guaranteed her by the Constitution and the Declaration of Rights.

You also want the record to reflect that she is under an order of protective supervision. She has been given custody of the child, and now she is being interrogated or questioned by various members of law enforcement agencies as well as perhaps even the Court on the whereabouts of the child.

You also want the record to show that your client is under an order of this court to remain in the custody of the warden of the Women's Detention Center of the Baltimore City Jail until such time as she purges herself of the contempt [23] citation issues in this matter. Am I correct?

MS. LIPMAN: Yes, Your Honor, certainly as to all of those factors.

THE COURT: Is there anything else we need to add into the record so that we can go on?

MS. LIPMAN: We can add one finding of law, Your Honor, if Your Honor is so inclined at this point, that she is reasonable in her assertion of the Fifth Amendment right, that if she answers the questions propounded by any law enforcement officials, if she were to disclose to the Court or to any any statement regarding the whereabouts of the child, or if she were to by any physical gesture point out or ride with any person or in anyone way go physically to bring back the child to to physically point out the child, that would be an answer which might be dangerous because injurious disclosure could result, that it is reasonable for her under the circumstances to assert the Fifth Amendment. In other words, it is a valid assertion of the Fifth Amendment under the circumstances of the case.

THE COURT: One of the problems that a witness always confronts in a situation that may not be totally identical to this one but where [24] there is concurrent jurisdiction of both a Child in Need of Assistance proceeding and a criminal proceeding is what they are going to do. Typically, in these kinds of cases, CINA proceedings move on a faster track than a criminal prosecution.

At some point in the CINA proceedings usually end up in court prior to the criminal proceedings. That is more likely a function of the rules of court which say we have to hold a hearing within 30 days or 60 days of the time the parties receive notice of the pendency of the matter.

The parent is a party. The parent may also be the subject of a criminal investigation, probably even an indictment or other charge in the process. At some point, in a CINA proceeding, a parent is given an opportunity

to decide if they wish to present any evidence. That evidence could be their own testimony. It is a choice they have to make.

MS. PARSONS: Your Honor, what we are dealing with is a finding of contempt, a jailing of our client with an opportunity to purge herself. We're saying that her opportunity is not [25] an option because it requires her to give up her Fifth Amendment right which we're hereby asserting.

THE COURT: I understand that. I want to make sure that the record is understood. What I am saying to you, Mr. Lipman, is I am not prepared to accept that final piece at this time. Number one, I want to research the law that you say is present. I don't think it is appropriate for me to make a finding of fact in the course of this hearing on an issue that may be a question of law.

MR. LIPMAN: I understand. Your Honor, I am not asking you to make the ultimate decision. I am asking you to make an interim decision, namely, that the answers to the questions have a tendency to incriminate her.

THE COURT: All right.

MR. LIPMAN: So, that way, to be quite frank, what I am trying to establish through all of these documents is that there is a real life potential harm of criminal prosecution out there and a finding of fact that that is indeed what's going on, that there is that potential is where I am. In other words, to quote the language of [26] Richardson v. State, that it is not therefore perfectly clear that the Appellant's answers could not possibly have a tendency to incriminate him.

I am at that factual posture now in this hearing. And when I am introducing all those documents, it is to show that is real, that there is a real possibility of incrimination. There are subsequent legal questions that certainly follow from that finding of fact, what do we do with the con-

tempt. I understand that. But I am there for that finding of fact so that we preserve a record so no one comes around back and says, oh, wait a minute, there wasn't a real danger here. They were just willy-nilly asserting that privilege. I want to be sure I am under that line to be quite frank with you. That is where I am.

THE COURT: All right.

MS. BRIMLINE: Your Honor, I don't think it is reasonable to assert the Fifth Amendment protection in this case because certainly the mother's attorneys could reveal the location of the child and thus she could purge without making a gesture, saying any words, answering any questions and certainly, that could not be used against her in any kind of criminal [27] case.

Secondly, although Mr. Glushakow did say he would not offer immunity at this time, he also said that was pretty much open to discussion, that DSS could at any time get in touch with him and it could be discussed. So, when it is proffered that he is not offering any kind of immunity, that is at the moment and also because there is no criminal action pending at this time.

THE COURT: Okay.

MR. MERVIS: Your Honor, I strongly disagree with Mr. Lipman's statement, that now is the time for this court to issue a finding of fact of the possible incriminating nature of the actions for which Miss Bouknight is subject to contempt. I believe that that is a legal decision that this court can only make after first determining the possible applicability of the Fifth Amendment to these proceedings.

I personally do not believe that the Fifth Amendment is at all applicable by virtue of, a, the subject matter, that is, that Miss Bouknight is refusing to reveal, number one; number two, by virtue of the limited nature of this court's request or order of Miss Bouknight, [28] i.e., to produce

the child; number three, by virtue of Ms. Brimline is pointing out arrange intermediate steps Miss Bouknight can take without incriminating herself and yet satisfying this court order; and finally, the distinctions that the Fifth Amendment applies to differing proceedings, be they civil or criminal. And I think all those issues must be looked at very carefully by this court before any finding is made as to whether Miss Bouknight is in danger of incriminating herself.

THE COURT: Thank you. The Court is inclined to agree with counsel for respondent. We will at this juncture, it will not release its finding of contempt nor release the mother from the requirements issued previously by this court to produce the child.

In the Court's view, there are many ways this can be done far short of the incriminating aspect of her in any way violating the protection afforded by the Fifth Amendment. We will allow you the opportunity to submit any memoranda that you think appropriate for the Court to consider. We would give you a schedule of a week to produce this information and share it with [29] all counsel.

MR. LIPMAN: Your Honor, let me back up one second if I can. Again, I want to make and I can make it in terms of a written proffer outlining all the documents we have sent as to why we feel that the criminal dangers are there.

THE COURT: No, I am not interested in that. What I am interested in is your position on the present status of the law. And I want that from the attorneys for the Department of Social Services and from the respondent.

MR. LIPMAN: Your Honor—

THE COURT: In the meantime, I will not lift the finding of contempt from these types of proceedings. What can lift it still is the production of the child.

MR. LIPMAN: Your Honor, I want to ask one question. How is she to produce the child if she is locked up in jail?

THE COURT: That is a decision that she makes. I don't have any idea where the child is or under what circumstances the child is living. Someone may become aware of Miss Bouknight's plight and produce the child. That would purge her of contempt of this court. In the [30] meantime, the only way, the only way to obtain the location of this child is for this court to issue an order to require that person who is charged with the responsibility for the care of that child to bring him forward. She can do that either through agents, representatives, or directly. In the meantime, the order will stand pending the receipt of memoranda from the lawyers and a review by the court.

MS. PARSONS: Your Honor, in order to do that, Miss Bouknight has to incriminate herself in some way. Then Your Honor's order shouldn't stand and the contempt shouldn't stand and she should not be held in jail even one day longer if her only avenue out, her only window is perhaps to incriminate herself. And that is why we're here today to raise her right not to incriminate herself.

We're not saying she would have to do that if she were to purge herself but she might. The possibility exists. And that is all the law requires. And that's why we're here today. And we would like some opportunity which the law again requires a showing of the reasonableness of her perception of danger and her decision through her [31] counsel to assert this right.

THE COURT: Assuming arguendo that the perception of reasonableness is present, the Court does not believe is dispositive of the issue. We will continue it, but we will at least research it and give you the opportunity to supplement what you are presenting here and for the lawyers for the other side who have just been presented with this to present it.

What you are asking the Court to do is to rule on your simple statements. I don't mean in the jargon sense, but this is what should happen without giving the attorneys for the other side the opportunity, who have received this information this afternoon, to respond. That's not reasonable.

MR. LIPMAN: Your Honor, I understand. And what we are simply—let me break it into a few points. One is we want to make our factual proffer since we can certainly do it in writing.

THE COURT: I think you've done that.

MR. LIPMAN: I think we've done that and all the indicia criminality, if you will.

Secondly, we sense a time problem, quite frankly, which may or may not be true. On [32] April 20 is when Judge Angeletti signed a Show Cause Order. The first sets of hearings in this case were the 27th and the 28th.

If Your Honor please, we are also looking for when a final judgment, if you will, could take place. What we would ask, if Your Honor please, we can prepare this memorandum and get it to counsel by tomorrow in great detail and get it to Your Honor. What we would like to do is see if they would have an opportunity to review it tomorrow and if we could come back on Friday to clarify the matter rather than a week so that there is absolutely no problem, and nobody starts asserting that we're 32 days or something like that. I don't see that as a real problem, but I want to be very careful about it.

THE COURT: The finding of contempt was issued either on the 27th or the 28th. It depends on the docket entries. I believe the initial hearing was on the 27th. Mr. Hines was present to represent Miss Bouknight because Mrs. Parsons was not available.

If I recall correctly, she was arrested by the police some time in the afternoon of the 27th or late morning of the

27th and was produced [33] in court. By the time we produced the lawyers, and I'm not sure if Ms. Brimline was here for the Department, by the time we assembled all the lawyers, it was the latter part of the day on the 27th. At the time we continued the matter to the 28th, and the final finding was issued on the 28th.

On the 27th, Miss Bouknight did reveal an application for child location, and that was in Dallas, Texas. The police checked it overnight, found the information was not correct and at that point, on the 28th, the Court when given this information issued a finding of contempt. If anything, your operable date is the 28th of April.

MR. LIPMAN: I appreciate that clarification, Your Honor.

THE COURT: I understand this court in this matter, and I am glad this is so, is not the final word in this matter. This is a very important question that you present for determination.

MR. LIPMAN: And I don't in any way assume anything besides just giving Your Honor those time frames. I certainly want Your Honor's decision to be fully informed.

[34] THE COURT: I know that, and I know you would like to have a decision by the Court that is favorable to you but in case you are not, you would like to know that the road to Annapolis is still available.

MR. LIPMAN: Yes.

THE COURT: The other problem would as well.

MS. BRIMLINE: I have a problem with the time frame Mr. Lipman has outlined.

THE COURT: Given the time he is outlining, it was assuming that the 20th was an operable day. The operable day is the 31st of May. If the 30th day would be the 28th, that's a Saturday. The courts are closed Monday, the 30th.

That's Memorial Day. The 31st would be the next available day after the 28th. And counting as I recall counting, perhaps I'm incorrect, the final day would be the 31st. Even if it is not, the final day would be the 27th which is a Friday. That's ten days from today or nine days from today's date. I don't think that is unreasonable in a case of this magnitude.

MR. LIPMAN: I do not either, Your Honor.

[35] THE COURT: I would therefore think you would be able to have something to the Court's attention by Wednesday, the 25th.

MR. LIPMAN: No problem, Your Honor.

MS. PARSONS: I would like to just add one thing to what Mr. Lipman has said.

THE COURT: Well, are you going to supplement the facts? I want to talk about dates right now.

MS. PARSONS: All right.

MS. BRIMLINE: Mr. Lipman is filing a memo. Does that mean we also have that same date of the 31st?

THE COURT: Yes. I think you ought to have the same date. The issue is the status of the law. He has given you the cases he is going to rely upon. Work with that. Is that all right with you, Mr. Mervis?

MR. MERVIS: Yes.

MR. LIPMAN: We'll have a memo in a few days, Your Honor, and a hearing in the middle of next week, given all those time frames is fine for Your Honor's ruling and our further offer of whatever we think is necessary in terms of testimony.

[36] THE COURT: We would strongly urge you to get whatever you are going to prepare in as soon as possible so the other attorneys would have an understanding of what they can respond to.

MR. LIPMAN: Yes, Your Honor.

THE COURT: Now, we can go on with testimony regarding the status in the handling of this case?

MS. PARSONS: Excuse me, I have one thing if I might.

THE COURT: Yes.

MS. PARSONS: Your Honor, Miss Bouknight can raise her right at any time and she is doing that today. She is not required to wait for this protection until memos are submitted to the Court. We would ask that she be granted this protection today at the time she is asking for it. And it is still our contention that if this protection is granted to her, the contempt no longer lies.

THE COURT: All right. I thought we had resolved that. I am not going to move on that.

MR. LIPMAN: I understand, Your Honor. We want her released but we understand the Court's [37] need to research, and we understand the other parties' need to research. We understand the gravity of the situation.

THE COURT: I am not going to release this lady under the order of contempt. Ms. Brimline?

MS. BRIMLINE: At this time, I'd like to request a postponement of the review case for several different reasons.

THE COURT: I thought we ruled on this yesterday.

MS. BRIMLINE: Well, we did.

THE COURT: Why are we raising it again? Or are you doing it just to make sure the record is clear?

MS. BRIMLINE: Well actually, I think perhaps I didn't argue fully yesterday. Since there was no one else present and no one else was objecting, perhaps I thought—

THE COURT: Even without their objections, I have denied the request for a postponement.

MS. BRIMLINE: Yes, Your Honor, I notice that, which is why I am back here again requesting a postponement of the review. [38] First of all, I'd like to request that Dr. Eisenberg be summoned. We did request he be summoned for the review hearing. However, for whatever reason, the Clerk's Office did not issue a summons to Dr. Eisenberg. Dr. Eisenberg is the last psychologist to evaluate, to give a complete evaluation to Miss Bouknight and I feel it is very important he be here to testify.

THE COURT: We can begin the hearing and if necessary to continue it to receive his testimony, that can be done.

MS. BRIMLINE: All right. Secondly, I would like to request that Miss Bouknight again receive another psychiatric and psychological evaluation pending this review hearing.

THE COURT: What does that have to do with the handling of this case? From September to April?

MS. BRIMLINE: I think that—I'm sorry, in handling the case?

THE COURT: Yes.

MS. BRIMLINE: How do you mean?

THE COURT: We're talking about a review. What has happened with this case since the time of the last hearing in court on the [39] issues which was August 1987 until today?

MS. BRIMLINE: I think the biggest thing that has happened is, number one, the child has disappeared and number two, the mother is failing totally to cooperate with the Department of Social Services. I think those are the two biggest changes.

I think the mother's reason for not cooperating perhaps could be ascertained by a psychological or psychiatric eval-

uation. While it is true the Department's request was granted a psychiatric evaluation of the mother by Dr. Rappaport on the 28th, I believe it was, I think those, the issues answered by Dr. Rappaport's report were very limited, just as to her ability to comprehend what was going on in court and to assist her attorney in defending on the contempt charge.

He also addressed the issue of whether the mother was a threat to herself or others, and he says she wasn't, but he specically excluded whether or not she was a threat to the child, Maurice Miles, at this time. And I think at this point, in terms of a review, with everything that's happened with the mother and the child [40] having been missing for so long, I think it is absolutely vital that the mother be evaluated again.

THE COURT: What is your next reason?

MS. BRIMLINE: The late hour, Your Honor.

THE COURT: Mr. Mervis and Miss Watts?

MR. MERVIS: Your Honor, while being sympathetic to Ms. Brimline's plight and the fact that it is difficult to review a case when the respondent of that case is not in physical or in speculative presence of this court, we have no problems with the case going forward and having the issues entered at this point.

THE COURT: Mrs. Parsons or Mr. Lipman?

MS. PARSONS: Yes, we would support the Department's request for a postponement or a continuance, whatever it can be called. I on my client's behalf would like to wait for a decision by the Court on the issue we've raised regarding the Fifth Amendment. We continue have a child at the moment. We may have one in a few days, and I would certainly appreciate the opportunity for our memos and for a decision on her right to be decided upon before we go forward at this juncture [41] with a review of this case.

I don't think anything is to be gained and certainly not, nor is it in the best interest of the child to proceed today on a review. I think there are other things that need to be settled first before we can have a full and fair review on the issues.

MS. BRIMLINE: Your Honor, just one additional thing too. At this point, we don't know whether the child is even alive. And I think that to proceed with a review hearing at this point not even knowing whether the child exists anymore, that it would be advantageous to wait to see if the mother does have a change of heart to produce the child or if someone else produces the child and wait to decide the child's fate when we are certain that he still exists.

THE COURT: The request for continuance is denied.

MS. BRIMLINE: Your Honor, I would like to have introduced into evidence the psychological report of Dr. Joseph Eisenberg that was compiled prior to the dispositional hearing and was in fact ordered by Master Joyce Mitchell for the dispositional hearing.

[42] THE COURT: Let's stop there.

MS. PARSONS: Objection.

THE COURT: What's the problem?

MS. PARSONS: I am objecting to her introducing Dr. Eisenberg's report.

THE COURT: Why?

MS. PARSONS: Because it is hearsay and because there is no chain of custody. There is no foundation. There is no, it is hearsay and I would request that Dr. Eisenberg be here to be cross-examined regarding his report.

THE COURT: This is a review. The Court will overrule the objection. Let's stop there with Dr. Eisenberg's report. What is the date of that report?

MS. BRIMLINE: The date of the report is, the date of the evaluation was July 27, 1987.

THE COURT: Was that report known to the Court at the time of the August 19 disposition?

MS. BRIMLINE: Your Honor, I cannot say for certain whether it was known to the Court or not. I know the mother's attorney was ordered to arrange a psychological evaluation for the mother and that she was to provide the Court and all [43] counsel with copies of that evaluation prior to disposition. When the case first came in for disposition on 7-17-87, the disposition was postponed at that time because the psychological was not completed. When the case came in on 8-18-87 for disposition, the parties went forward by stipulation.

So, I am not sure whether any of the parties actually saw the written evaluation, whether, I'm not sure what knowledge any of the parties had, and I certainly don't know whether the Court was aware of what was contained in the disposition.

THE COURT: The written report was not available, you say?

MS. BRIMLINE: As far as I know, the written report was not available. It was not available to the Department of Social Services. We did not receive a written copy of it until September 8, 1987 which was long after the disposition.

THE COURT: Did anyone know the contents of the report at the time of the disposition on August 17?

MS. BRIMLINE: I'm not sure to what [44] extent every person knew the contents.

THE COURT: I didn't say every person. I said did anyone.

MS. BRIMLINE: I do know that the DSS attorney knew it was extremely negative because there was no legal file.

THE COURT: What did your agency do with the report once it received it in September 1987?

MS. BRIMLINE: What did we do with it in terms of what, Your Honor?

THE COURT: What did you do with it in terms of the contents of that report, vis-a-vis the Court?

MS. BRIMLINE: Nothing, Your Honor.

THE COURT: Can we discuss that for a moment, please?

MS. BRIMLINE: Certainly.

THE COURT: That report is extremely negative for the ability of this mother to act as a parent and guardian for the child. Why was there no request for a review?

MS. BRIMLINE: I am not certain, Your Honor, why there was no request for a review.

THE COURT: That's one of the things [45] the Court wants to talk about.

MS. BRIMLINE: Well, I am willing to talk about it in as far as the information I know.

THE COURT: I want the record to reflect what happened in that situation.

MS. BRIMLINE: Okay. I think in a situation like this, where the report was received, it would have been received by the Protective Services case worker. As I said, it was not received until September 8.

THE COURT: That's the date that is stamped on your copy?

MS. BRIMLINE: This is the date stamped on the Protective Services copy. So, that's when Protective Services received it, and I would assume, although it is always dangerous to assume, that the PS worker received it at least within a day or so. I would suppose that probably

your question is why didn't the Department file an immediate review petition.

THE COURT: That's what I asked.

MS. BRIMLINE: I think that one has to look at the entire situation at DSS to know the answer to that in terms of caseloads by the Protective Services workers, not just this worker [46] in particular but all case workers at DSS Protective Services, foster care workers.

In terms of Protective Services caseloads, especially, there are demands that are placed on those workers that are not placed on workers in other services in terms of dangerousness to children, in terms of making home visits, emergencies arising, that sort of thing.

So, I think that a worker, upon receiving this evaluation, it certainly is, as the Court said, very negative. In fact I would even go so far as to say damaging in terms of the mother's ability to care for this child. But at the same time, a PS worker also might have as many as 80 other cases with the same priority listing as this particular case where the danger to those other 80 children or perhaps more than 80 children, 80 families, is just as great.

THE COURT: You are a lawyer, aren't you, Ms. Brimline?

MS. BRIMLINE: Yes, Your Honor.

THE COURT: You are subject to the grievance process, aren't you?

MS. BRIMLINE: Yes, Your Honor.

THE COURT: You know the answer that [47] the courts give to lawyers, busy lawyers, when they blow the Statute of Limitations on a particular case, don't you?

MS. BRIMLINE: Yes, Your Honor.

THE COURT: What is that answer?

MS. BRIMLINE: Tough.

THE COURT: That's exactly correct. The fact that you are busy or have a heavy caseload is no justification for the dimunition of the rights and privileges of your client.

MS. BRIMLINE: Your Honor, I don't think that is what I am saying. What I am saying is there has to be a balancing. This child's life is extremely important to the Department as is every other child that we have a court order on or every other child where we're not even involved in court or where we have Protective Services cases open.

Every time we get a record, every child is equally important, every child's life. To say that everything should have been dropped so this worker could come and file a review petition on a certain day, I think, is asking for a degree of exceptionalness, if there is such a word.

THE COURT: No, we are not, Ms. [48] Brimline. This court is very much aware of the extraordinary conditions under which social workers have to labor in an urban community. If it had been filed on the 10th, the 15th, the 25th, or the 1st of October, we surely would have been sympathetic. For this report to not reach the Court in any fashion until the 20th of April, 1988 is unconscienable.

MS. BRIMLINE: Your Honor, I am not sure the report didn't reach the attention of the court prior to that date. I don't know whether the report was ever—as I said, the attorney for the mother was ordered to provide the Court with a copy.

THE COURT: It was never provided by anyone.

MS. PARSONS: Your Honor—

THE COURT: I'm going to get to you all in a minute. It was not provided by anyone until the 20th of April 1988. When you take on a responsibility, a certain amount

of reasonableness goes with that responsibility. When it hasn't been carried in order, all sorts of problems arise.

MS. BRIMLINE: Your Honor, I think the [49] word reasonable is the key in this entire case. I think the Department has acted reasonably in this case.

THE COURT: Far from it in the Court's opinion, Ms. Brimline.

MS. BRIMLINE: Well, I think the Court is not aware of all the facts in the case.

THE COURT: You are given the opportunity to present them right now. Don't look at the clock, Ms. Brimline. I have no place to go, and I am not in a hurry to get there.

MS. BRIMLINE: I was just thinking in terms of the air conditioning going off at 5 o'clock.

THE COURT: We have fans.

MS. BRIMLINE: If the Court is seriously interested in knowing—

THE COURT: I'm as serious as a heart attack, Ms. Brimline. I have concerns about this matter that include the Court's performance in this case. The docket entries in this matter indicate that on July 17, 1987, the child was placed under an order of shelter care to Baltimore City Department of Social Services to be specifically placed in the home of the mother.

[50] Quoting from what the clerk placed on the docket, "Order of shelter care with mother. If psychological reveals that the child would be at risk, pending the hearing, child shall be placed." That's the notice to everyone, the Court included, that something is out there that we should perhaps be aware of.

I am also concerned that if lawyers had notice of this document and did not produce it, they may have committed

ethical violations along with endangering the child. I want to talk about these things. And yes, I am very serious.

MS. BRIMLINE: All right. Well then since you are saying you are very serious about wanting to know the entire story about what the Department's responsibility and reaction to the report and other situations, I am sure, again, I would ask for a postponement so we can have the necessary witnesses here and also that personnel for the Department of Social Services can be present and prepared to outline exactly what efforts were made specifically in this case but also what hindrances, what drawbacks, what caseload problems are also present.

I think if you are going to look at the [51] one thing in terms of the Department's performance in this case, you must also look at the hurdles that the Department has to overcome in order to do what the Court orders us to do. And I think to look at one without looking at the other would be grossly unfair.

THE COURT: Who do you want to be here, Ms. Brimline?

MS. BRIMLINE: I would like Dr. Eisenberg to be here. I would like everyone who was here this morning in terms of the Department director, Ira Johnson, I would want Mrs. Marks, I would like to have all of them here so they can explain on the various levels how this situation arose.

THE COURT: Is there anyone else?

MS. BRIMLINE: At the moment, I can't think of anyone else except perhaps the therapist from the Family and Children. The Department made a referral for this mother to be seen by a therapist at the Family and Children Society. I would think that her input would be very necessary; also the therapist who worked with the mother for a while from if University of Maryland Infant Study Program. I think also the parent aid [52] who has been in-

volved in the case and in fact was the last person from The Department of Social Services to see the child.

I think the foster care worker, if we are going to do a review of this case and what has happened since the last hearing and in fact even from before the last hearing, since it would have to go from the time the child was returned home, I think all of these people need to be here.

Now, whether they, at that point, would be willing to testify is another issue. But in terms of representing the Department of Social Services—

THE COURT: Why wouldn't they be willing to testify?

MS. BRIMLINE: I think that in terms of—the Court is raising some issues about responsibility in this case. And the Court must be aware also that there is also a possibility of criminal liability in any kind of case like this.

So, I think that whether people from the agency want to testify, they are going to have to be advised of their rights in terms of criminal liability. But at this point, those are the people that I would be thinking of in terms of [53] calling for a review hearing. And I think if the Court truly is interested in knowing the entire story, I think all of that should be on the record.

THE COURT: Miss Watts, Mr. Mervis, what did your agency know about these reports?

MR. MERVIS: Your Honor, we have spoken to the attorney who handled the case at the time who is no longer employed with our agency. He has told us that he knew of Dr. Eisenberg's general recommendation against the return home at the time of the disposition hearing but that he did not have a copy of the report. He does not recall, actually, I should change that, I did not ask him when he received a copy of the report. There is one in the file that was sent by the Department of Social Services, and it has their stamp on it.

THE COURT: Did you all ever receive a copy of the report?

MR. MERVIS: From the Department.

THE COURT: When?

MR. MERVIS: That I don't know.

THE COURT: Was it prior to the proceedings in April?

MR. MERVIS: I believe it was, Your [54] Honor.

MS. BRIMLINE: Your Honor, I believe it wasn't.

MR. MERVIS: No?

MS. BRIMLINE: I don't believe so.

MR. MERVIS: Miss Watts and I didn't handle the case.

THE COURT: I know that.

MR. MERVIS: And that specific fact, I did not discuss with the previous attorney. My involvement in this case has only begun in the last two, three days, since Friday, Your Honor. So, I am still piecing together the chronology myself at this point.

I can tell this court that the entire agency is very upset over what has happened and is currently looking inward to take steps to make sure that it does not happen again, and that we as an agency will be reviewing all Protective Services recommendations to ensure that they are appropriate and that we as an agency can provide the type of monitoring that dangerous cases require. And those discussion are already, have already been held Monday and Tuesday and are ongoing. But we share the Court' deep concern and [55] cannot offer this court at this point satisfactory explanation as to what happened on my part.

THE COURT: Mrs. Parsons or Mr. Lipman?

MS. PARSONS: Your Honor, I was handling this case from the beginning, and I do recall that all attorneys on

this case were aware as the other parties have indicated of the negative nature of the doctor's comments. I saw the report of Dr. Eisenberg for the first time a few minutes ago in the hall. I never did receive it from the Department of Social Services.

MS. BRIMLINE: Excuse me, Your Honor. It is not the Department's responsibility to provide her with a copy.

THE COURT: Have a seat, Ms. Brimline.

MS. PARSONS: I just said I never saw it, I have not received it to this day.

THE COURT: Ms. Brimline indicates that the report was ordered at the request of, through your agency.

MS. PARSONS: No, sir.

THE COURT: Your office never made the request of the production?

MS. PARSONS: Not to my knowledge.

MS. BRIMLINE: Your Honor, the Public [56] Defender, now speaking with the Court, in fact, called Family and Children's to arrange for this referral to be made for the evaluation. In fact, it was a mixup, and that's why the original disposition had to be postponed because originally, she was to be evaluated at Phips. However, Phips was not prepared to evaluate her.

I can't remember what the reason was now, but at that point, Mrs. Parsons was very much involved in terms of talking with Family and Children's therapist to have the evaluation done, and she was court ordered to produce that evaluation.

MS. PARSONS: I was not court ordered. May I continue?

THE COURT: Yes, please.

MS. PARSONS: Thank you.

THE COURT: You are all aware that Dr. Smith is in the courtroom even though Dr. Eisenberg isn't here. Doctor Smith is his associate, partner. Is that correct, Dr. Smith?

DR. FROST: I'm Dr. Frost.

THE COURT: I'm sorry. I apologize.

MS. PARSONS: We were at the time of the disposition of the nature of the comments from [57] the doctor. In spite of that and based, I think, on, well, based on a number of things but particularly on a report from a Ms. Hubbard, and I believe she was with Family and Children's Services—

THE COURT: What report is that? We don't have a copy of that.

MS. PARSONS: Well, I have just this one copy and it is not dated. It says Carol Hubbard, Family and Children Services. And I don't think she works for them any longer. In fact, I think she was leaving and someone was replacing her at the time we had disposition. But her report was very glowing and it described the mother's involvement and eagerness for counseling and her being eagerly engaged in parenting classes, and so on and so forth, cooperation with every suggestion of DSS and her, just her overall conduct in regard to the suggestions that were made and so on.

For whatever reasons, and I don't recall all the reasons why, all counsel entered into and signed a stipulation on 8-18-87. And this was after the report of Dr. Eisenberg or at least his findings were known to us, and in spite [58] of his findings, we entered into the sstipulation that we did.

We all believed and felt and signed the stipulation, the agreement, that, I believe, the mother was capable of taking care of her child, and if we were to review that stip-

ulation today, it would be my contention that we have no indication that she hasn't taken care of this child even today.

As far as my being ordered to provide, to refer for a psychological, I don't recall any such order, and I certainly don't have a copy of any such order in my file. I do remember that, and I have it in my notes, that I was to make a referral for a psychological.

I agreed to do that and I called her counselor, Leslie Morris, and she then took the responsibility for making the referral and frankly, I don't remember what happened with that. But all this referral for psychological and so on was all prior to our agreement at disposition on 8-18-87.

Again my recollection, it has been a year, a little less than a year, I don't recall all the details, but I do know and I have the [59] signed document that in spite of whatever agreements or psychologicals were taken or had or were thought of being needed, we all in spite of it agreed to what we agreed to for the reasons that we each had to do that. And it is my contention today that decision was reasonable then and it is reasonable to continue the situation today as far as we know it.

THE COURT: Are you prepared to begin a portion of your case this afternoon? Do you have the case worker here?

MS. BRIMLINE: Yes, but that would not be the order that I would necessarily call them in and as I stated, there may be a problem in terms of criminal liability in having them testify. I am not prepared to begin today.

THE COURT: I am.

MS. BRIMLINE: Could I have a few moments?

THE COURT: Yes, we'll take a brief recess while you set the matter up.

(After recess.)

THE COURT: The Court has had the opportunity to speak with all counsel in chambers. During the course of that discussion, counsel all [60] have prevailed upon the Court to reconsider its earlier ruling regarding initiation of testimony in the course of a review proceeding.

The Court has carefully considered the comments made by counsel and accordingly will set off the review. No testimony will be taken in the course of a review at this time. Ms. Brimline representing the Department has also indicated she is going to submit with copies to all counsel the records of the Department of Social Services so they will supplement the Court's file.

MS. BRIMLINE: Yes, Your Honor. I have those right here and in fact am distributing them right now.

THE COURT: If I understand you correctly, these are the records regarding this case as maintained by the Baltimore City Department of Social Services.

MS. BRIMLINE: Yes, Your Honor. They include the Protective Services case of Jacqueline Bouknight, and also the foster care record on Jacqueline Bouknight.

THE COURT: All counsel have received their copies of these documents. The matter of the hearing on the review of the order of [61] protective supervision will be rescheduled by the Court after notice to counsel—excuse me, after consultation with counsel as to an agreed upon date.

We will not do that today. There is the remaining matter of the motions submitted to the Court by the mother. The Court will hold a hearing on those in the morning docket on the 26th of May. We understand that Miss Watts will not be able to be present but Mr. Mervis is going to be present in her stead. All other counsel we anticipate to be available.

MS. PARSONS: Nine o'clock?

THE COURT: In the morning, the morning docket.

MS. BRIMLINE: The Department is available.

THE COURT: If there is no other business of the Court, we will—

MS. BRIMLINE: Yes, Your Honor.

THE COURT: Yes, ma'am?

MS. BRIMLINE: I had asked to offer Dr. Eisenberg's evaluation into evidence, and I don't remember the Court making a ruling.

THE COURT: The Court overruled the [62] objection made by Mrs. Parsons and accepted it.

MS. BRIMLINE: Thank you, Your Honor.

THE COURT: This evaluation was also submitted to The Court as an attachment to one of the pleadings filed in April of this year. Mr. Lipman?

MS. LIPMAN: Yes, Your Honor, we were wondering if the clerk could extend us a bit of administrative kind of convenience, if we could use this room, this courtroom or another room, to talk with our client for about fifteen minutes or so. It might be better than going back to the Lockup. Can we have a room?

THE COURT: If I am not mistaken, she is in the custody of the Baltimore City Jail.

MR. LIPMAN: That's correct.

THE COURT: Who produced her today? Did the Sheriff's Office produce her?

DETECTIVE FRANCIS: Detective Francis from from Baltimore City Police Department.

THE COURT: You produced her today?

DETECTIVE FRANCIS: Through the Lockup. So, she is to go back to the custody of the City Jail Lockup.

THE COURT: We may be able to [63] accommodate that opportunity, Mr. Lipman. We don't know where.

DETECTIVE FRANCIS: However, I won't be able to stand by with her, as I said again, but she is in the custody of the jail. I am going to go out and continue with the leads in this case here.

THE COURT: Okay.

THE COURT: You may be able to have a location in the Lockup of the Courthouse.

MR. LIPMAN: All right. We'll take a look and see if we have that room. I just thought we might have that today. When we go over to the jail, we are afforded the opportunity of a room which is nice.

THE COURT: The only thing we have of a private nature is that back there. We've used it on many occasions, and it has been certified by all levels of law enforcement for the State. Yes, ma'am?

MS. BRIMLINE: There is one other matter, Your Honor, and that is the issue of shelter care pending the review hearing. At the present time, we have a general order of shelter care.

[64] THE COURT: Was there an order of shelter care issued subsequent to the order of protective supervision?

MS. BRIMLINE: Yes.

THE COURT: Who is the master who issued it?

MS. BRIMLINE: Master Price.

THE COURT: When?

MS. BRIMLINE: On April 20th.

THE COURT: What is the position of the parties?

MS. PARSONS: I'd be objecting to it.

MR. MERVIS: Your Honor, no exception was ever filed to that order of shelter care.

THE COURT: It is a new request.

MR. MERVIS: It is a new request, Your Honor. In addition, I think it is appropriate for shelter care to be given since the issue is custody of the respondent. And at this point, since his whereabouts are completely unknown and his mother is not able to care for him, custody should be ordered by this court to reside somewhere.

THE COURT: There is no other relative resource available to care for this child that has [65] been brought to the attention of the Court. The Court will issue an order of shelter care to the Baltimore City Department of Social Services.

MS. BRIMLINE: Thank you, Your Honor.

THE COURT: Are there any other matters to be brought to the attention of the Court? Thank you.

(End of proceedings)

[Baltimore *Sun* article May 12, 1988]

Mother jailed till she reveals whereabouts of 19-month-old son

By Jane A. Smith

A young East Baltimore mother with a history of drug abuse and neglecting her child is in jail and will stay there until she tells authorities where her 19-month-old son is, officials said yesterday.

The woman was found in contempt of court when she and her son failed to appear for a April 20 juvenile hearing in Circuit Court that had been requested by the Department of Social Services.

Authorities found the woman, Jacqueline Bouknight, 21, at her home in the 1700 block of North Washington Street, but her child, Maurice M , was not there. Ms. Bouknight was jailed for refusing to tell authorities where he is, and since then she has told police "conflicting stories" about the whereabouts of her son, sources said.

She told police the child was with a sister in Texas, but authorities there were unable to find him. The sister said the baby was never with her, sources said.

Ms. Bouknight's foster father, John Brown, whom she lives with, said that the case "is as big a mystery to me as it is to the detectives."

"I don't think no harm has come to him, as crazy as she is about that boy. She loves him very much," he said. "You can't reach her. She won't talk to me. I got a lawyer for her, and she wouldn't talk to him."

Mr. Brown, who noted that his foster daughter also has a history of mental problems, said he thinks she's afraid Social Services "will snatch her baby."

The Department of Social Services took the baby away from Ms. Bouknight after he suffered a broken left leg when he was several months old. He was returned to her several months later, Mr. Brown said.

Last August, a juvenile master in Circuit Court determined that the youngster needed to be in the protective supervision of Social Services. The boy was allowed to stay at home with his mother, provided she attend counseling and parenting classes offered by Social Services, sources said.

Last month, when a case worker discovered that Ms. Bouknight was not going to the sessions, he asked Juvenile Master Joyce Mitchell for an emergency review of the case, according to sources.

A hearing was scheduled for April 20, but neither the mother nor her child appeared for it.

A juvenile justice source said Social Services got involved in the family because the department suspected Ms. Bouknight neglected her child. "It was more neglect than abuse," he said.

The boy's father is dead, the victim of a shooting in March.

The Department of Social Services refused to comment on the case.

CIRCUIT COURT FOR BALTIMORE CITY

MAY 26, 1988

[Title omitted in printing]

PROCEEDINGS

[3] MS. BLIMLINE: Good morning. The Department would like to call the case of Maurice M, Case No. 88704202, Marilyn Blimline, representing the Baltimore City Department of Social Services.

MR. MERVIS: Mitchell Mervis, from Legal Aid, on behalf of the respondent Maurice M. I am entering my appearance today as co-counsel in the matter, along with Lisa Watts.

MR. LIPMAN: George Lipman, Assistant Public Defender representing Jacqueline Bouknight.

MS. PARSONS: Robin Parsons, Assistant Public Defender, representing Jacqueline Bouknight.

THE COURT: Counsel, we scheduled this matter for a hearing this morning, for the purpose of reviewing the issue you presented on the 5th Amendment question.

We used the 5th Amendment characterization of the issue, as it is encompassed in Article 22, of the Maryland Declaration of Rights, of the Maryland Constitution. Both speak the same language.

MR. LIPMAN: That's correct. Your Honor.

THE COURT: The Court has read several memoranda.

MR. LIPMAN: If, Your Honor, please, I have 2 preliminary matters, one of which, frankly, Your Honor, did clarify to my understanding at our last meeting, on May 18th.

But since that time, I have had an opportunity to [4] obtain and read the transcripts of the hearings on April

27th and 28th, before Your Honor, and the hearing of April 20th of 1988, before Judge Angeletti.

If, Your Honor, please, my understanding was, I'm sure I'm correct, but my understanding was that the Order of Contempt was entered on the 28th of April, 1988.

When I read the transcript from Judge Angeletti's proceedings and the proceedings on the 27th, there is what I construe as loose language about continuing Judge Angeletti's Order of the 20th.

As, Your Honor, knows, I very much hope for a favorable ruling from, Your Honor, today. In the event that we don't, we may well want to appeal it. I'm worried about the 30 days.

Again, my understanding from the last hearing was that the hearing was continued so there would be an opportunity for these briefs and memorandums, with the understanding that the 28th was the operative day of Your Honor's Order of Contempt. I want to be clear in case some other person starts reading those transcripts, incorrectly, on that issue.

THE COURT: The Court believes that all counsel agree that the 28th was the operative day; is that correct?

MS. BLIMLINE: Yes, Your Honor.

MR. MERVIS: That's the position of our counsel, Your Honor.

THE COURT: Fine.

[5] MR. LIPMAN: The second point is, we attempted, I think, unsuccessfully to summons a witness for today's hearing. That was Detective Tyrone Francis, of the Baltimore City Police Department.

Apparently, through a problem in our office, or a problem in the Clerk's Office, the summons was sent—given to the clerk; but it was never sent to Detective Francis.

I think I can simplify things by proffering what Detective Francis would say. I attempted to get a stipulation from counsel as to this.

THE COURT: We won't proffer anything unless there is a stipulation.

MS. BLIMLINE: There is no stipulation.

MR. MERVIS: That's correct, Your Honor.

MR. LIPMAN: We would ask the Court to issue an immediate summons for Detective Francis to come.

MR. MERVIS: Your Honor, the 2 methods of summons and subpoenaing witnesses to appear before this Court are: One, through the Court and the Sheriff's Office. There, also, are vehicles through personal service, under Rule 1-321.

If, in fact, the sheriff was unable to serve, there has been enough time for the Public Defender to learn of this and ensure that they tried to personally serve Detective Francis themselves, to avoid the this situation.

If, in fact, they want this hearing to go forward [6] before their Appeal Rights expire, they should have done everything in their power to ensure his presence.

MR. LIPMAN: If, Your Honor, please, I would proffer on the 20th, it is stamped from the Clerk's Office, a summons was here. For whatever reason, it was not issued.

THE COURT: Was it here?

THE CLERK: Your Honor, it was filed in 118. It was filed in 118 on the 20th. The section that does the summons received it on 5-23. The hearing was set for 5-26, which is not enough time for them to serve.

MR. MERVIS: I would also like to point out that I have always known and have had the understanding, by the Clerk's Office, that summons that are requested within a

week of the hearing will not be served; and that personal service is the only method of compelling the witness to appear in a shorter time frame.

THE COURT: This is not a rule of the Court, but a procedural directive from the Clerk of the Circuit Court for Baltimore City, that you must give the clerk, 5 working days to issue a subpoena. If you want a subpoena issued, and you are asking for it with less than 5 days to the hearing, you should ask a Judge to sign the subpoena, directing the clerk to issue. Otherwise, they refuse it.

What is it that you think Detective Francis will add to those proceedings?

[7] MR. LIPMAN: Your Honor, I would proffer that Detective Francis will say the following.

MS. BLIMLINE: Objection.

THE COURT: I understand your objection. We would hear the proffer for record purposes only at this point.

MR. LIPMAN: He would testify that that he's a detective, employed by the Baltimore City Police Department; that on or about 12:00, on May 18th, that he assumed custody of Miss Bouknight, from the Lock-Up, on the 1st floor of this courthouse, which is maintained by agents of the Baltimore City Jail; where Miss Bouknight has been committed on Your Honor's Contempt Order.

That he took Miss Bouknight to the 3rd floor Conference Room, of the Violent Crimes Unit, 3rd floor of this courthouse. The Violent Crimes Unit, being an office of the State's Attorneys Office, Baltimore City, that he was speaking with Miss Bouknight, by himself, in the Conference Room of the Violent Crimes Unit of the State's Attorneys Office; that he was interrupted in speaking with Miss Bouknight by myself and stopped speaking with Miss Bouknight.

That if asked: If Miss Bouknight had told you that the child, Maurice M , was across the street from the courthouse would you have kept that information to yourself; or would you or one of your associates have gone across the street, and take physical control of the child, Maurice M ?

[8] He would testify that if Miss Bouknight had so said that, that he would or one of his colleagues would have gone across the street and taken custody of Maurice M .

The relevancy of it, Your Honor, is that an issue presented in the 5th Amendment, whether this is contempt leads to a requirement that she give testimony or speak.

And, Your Honor, by the relevancy of it, in fact, this Court Order became a mechanism, whereby, she was, in fact, taken out of the Baltimore City Jail; taken to the police, to an agency of the State's Attorneys office, interviewed by a detective, who would have acted to seize—and I use that word loosely—to take custody of the child, were she to have given him information as to the whereabouts of the child.

THE COURT: Obviously, that lends support to the argument you present, which is, that your client is in peril of having her 5th Amendment Rights abridged.

MR. LIPMAN: To a point of a peril.

THE COURT: The Court's problem with your whole presentation, even if we assume that the limitations that you place is in her mind, that did not support the issue before the Court. The respondent has many ways of purging contempt. You want to limit this to only testimony.

Aren't there other ways she could act to free herself of her predictament?

Suppose Maurice M , assuming capability, walked into [9] the courtroom at this very moment, would that not satisfy this Court's Order of Contempt against the mother?

MR. LIPMAN: Your Honor, let me back up one second and then I will answer Your Honor's question.

My point is: It did through the risk, the fear of harm that Miss Bouknight has. The second point is: It shows what's happening in the case.

THE COURT: It also shows the risk on the part of the persecuting agency of the State. If they know that this woman has counsel, continue to question her, without the presence of counsel, they have precious little to stand on, if a statement is obtained. That's their peril, though.

MR. LIPMAN: My main point on this is not the 6th Amendment. My main point on this is, however phrased—what's going on here in this case is that people are trying to probe into Miss Bouknight's mind, trying to ask her, where is Maurice M doing it in a very assertive way. And that is what's going on here.

THE COURT: That's the police department.

MR. LIPMAN: However it is phrased.

THE COURT: That's the police department.

This Court, sitting as a Juvenile Court, has jurisdiction over Maurice M. It has issued a directive for Maurice Miles to be present in court. It has also issued an Order to the last custodian of Maurice m to produce that [10] child in court. That act has not been done.

The contempt is issued not because she refuses to testify in any proceeding or she testifies in any proceeding, the contempt was issued because she has failed to abide by the Order of this Court, mainly the production of Maurice M.

If Maurice M is produced, by whatever means, this Court will purge its contempt. If the child could be produced by anyone or any vehicle, and we would be satisfied.

If she chooses to remain silent, which is her right, she has made her own choice as to her methods of purging. That's not the only method of purging Contempt.

MR. LIPMAN: Your Honor, our position—however you phrased it—is that the product of her mind has to yield the whereabouts of Maurice M. That now, she has to speak to someone, that somehow she has to order some agent, through her mind, through her lips to produce Maurice M.

The 5th Amendment, in Article 22, was very broad. Despite some of the well-researched cases by Miss Blimline and Mr. Mervis, when you look at the major cases on testimonial vs. nontestimonial, *South Dakota vs. Neville*, the Court is very, very careful to not say there is this kind of nuance line between real testimony, real evidence and testimony in fact.

They repeatedly go back and say, we are not going to get into this little nuance between when something is a statement by lips, when something is, at the same time, by acts [11] repeatedly.

I know, Your Honor, has read the case; but Neville is right there. We are talking about the blood alcohol test for a drunk driving situation. Justice O'Connor refused to get in that little trap of saying: Well, this is real evidence here; this testimonial evidence.

The line is very blurry. Whenever that line is real blurry, we are going to say, it's the 5th Amendment. That's precisely what's going on here now. She can speak one way or she can speak another way. There is testimony. They think it is smack down in the middle of 5th Amendment.

THE COURT: Perhaps, this may be the occasion for further reviews.

MR. LIPMAN: In that regard, I would like to make sure that the record includes—and we put in a number of documents at the last hearing. It does include the tran-

script. I have a copy of it—of the proceedings before Judge Angeletti, on April 20th.

THE COURT: Isn't that your responsibility for assembling the transcript when you take this matter to the Annapolis?

MR. LIPMAN: Yes, Your Honor. I would like, Your Honor, to consider in his ruling today, many of the statements as made to considered in good faith by Judge Angeletti and Miss Blimline, where they repeatedly said:

[12] "This child could be harmed. I'm going to start this Contempt Proceeding right away, so we can get to this child. I'm really afraid that this child is greviously hurt."

There is nothing wrong with the attempt by Judge Angeletti and Miss Blimline. It tells us quite clearly that there is great fear on the part of the respondent in the broader sense of the word.

THE COURT: It is a given that there is great fear for this child. We have a situation where the child was placed in the custody of the mother in August of 1987.

The last time, the agency had official contact with the child was September of 1987. Here, it is, in April of 1988 and the Department files a Petition for Emergency Relief, saying we haven't seen the child. We don't know what's happening with the child.

Apparently, a Missing Persons Report was also filed by the agency on behalf of the child. Obviously, someone feels that this child may be at risk. If it wasn't felt to be at risk, these proceedings would not even have taken place.

MR. LIPMAN: If, Your Honor, please, a risk for the child at the hands of Miss Bouknight—in other words, that we are in fear, that the State will prosecute Miss Bouknight.

THE COURT: I don't know that the State of Maryland, in it's many presentations, has suggested that the child is at risk at the hands of Miss Bouknight.

[13] The State has indicated that the child is at risk. We don't where the child is—a 19-month old child whose whereabouts, that is unknown, is at risk under any circumstances.

MR. LIPMAN: Again, also, I say on the transcript which I will introduce, or have been introduced I hope—if, Your Honor, please, the next—Miss Bouknight—

THE COURT: Are there any objections of the transcript of the prior proceedings?

MS. BLIMLINE: Yes, Your Honor. I don't see where it is relevant to today's proceedings at all.

MR. MERVIS: I have not had an opportunity to review it. I was just handed the transcript, forthwith.

THE COURT: Read the transcript. The Court will allow them to be introduced into evidence.

MR. LIPMAN: I'm talking–page 19 and 20 of the transcript.

THE COURT: Is there a reason we didn't do this before the hearing began?

MR. LIPMAN: I got it yesterday. I received it from them this morning. I received it this morning. I'm not complaining about either of those. I gave them the first opportunity. I will give it to Miss Blimline and Mr. Mervis.

THE COURT: Read them, folks.

MR. LIPMAN: Your Honor, what I'm hoping to do is quote [14] page 19 and page 20 of the April 20th of 1988 transcript, page 19 and 20 of the April 20th.

MR. MERVIS: Your Honor, I have read the passage and I have no objection to it.

THE COURT: The Court will mark it as Mother's Exhibit No. 1, for today's proceedings, but we ought to be making this successive. I don't know the successive numbers. We will mark them No. 1, simply for clarity.

MR. LIPMAN: If, Your Honor, please, there has been prior discussions, prior to this point, of a report by a Dr. Eisenberg, a psychologist.

THE COURT: That's part of the court record.

MR. LIPMAN: That's part of the court record. The Court, in this instance, Judge Angeletti has read the report and makes the following statement:

"The child's representative, Miss Watts, joined in with the Department of Social Services. Apparently, a decision has been made to terminate the foster care relationship even in light of the finding by Dr. Eisenberg, that is, it is not recommended that she regain custody of the child because it cannot appear that she's emotionally capable of providing the proper nurturance and care that would be required for this child's safety and security.

She's in need of intensive and extensive intervention, both emotionally and socially, to help her deal constructively [15] with not only her own internal issues, but also those requirements for independent and self-sufficient functioning.

What that tells me, we have a lady in a severe crisis here and also probably, a dead child somewhere. And it is depressing to know, and I'm not going to kid you, between the fear that this woman has killed or harmed this child in this Contempt Order is just there. It is smack there, right in the middle that we feel."

THE COURT: Mr. Lipman, you have made that point very, very clear. Suppose the child walked in the door at this very moment, how is that testimony on her part? No, take my supposition. How is that testimony on her part?

MR. LIPMAN: If the child walked in here, God forbid, disfigured—

THE COURT: No. Mr. Lipman, don't change my supposition. Accept it. The child walks in the door. It would No. 1, purge the contempt. How is that testimonial?

We can then get to the issues of what condition the child might be in; but let's take, right now, the child walking through the door.

MR. LIPMAN: Under his own power, an 18 month old?

THE COURT: Take my supposition. Is that testimonial?

MR. LIPMAN: Is it testimonial? If, yes—

THE COURT: It is testimonial.

MR. LIPMAN: Yes.

[16] THE COURT: How?

MR. LIPMAN: It has to relate to something.

THE COURT: What do I care what it relates to?

MR. LIPMAN: Your Honor, I'm not concerned about what you care.

THE COURT: I understand.

MR LIPMAN: I'm concerned about what the prosecutor cares about.

THE COURT: That's fine. You are concerned about the prosecutor; and the Court is particularly—I'm concerned about the child. That's all. I'll concerned about producing that child.

If it comes in with the grandmother, with the local priest, or with a physician, it matters not. It would come in to this court. The Order of this Court is for the production of that child.

I do not know how that in any way is probing, whatever, might be in this lady's mind. I am not concerned about

her testifying in these proceedings. I will protect her right to not be testifying in these proceedings, or instead, she has invoked her Right of the 5th Amendment. No problem.

MR. LIPMAN: I would call the Court's attention to *Maness vs. Myers*; in that situation, there was no criminal action, whatsoever. There was a judge or a board of some sort, that was inquiring as to the zoning or the appropriateness of [17] having a dirty bookstore on a corner in the city. There was no criminal charges pending. The one party asked for the magazines. The 5th amendment applied, bring in the magazines. There is a reasonable fear that in that may contain many pornographic material. There would be a future prosecution as to pornography, and the 5th Amendment applied. That's the situation we have right here. Smack down.

I understand the Court's concern for the child, of course; but it is not only a criminal proceeding. It is in any kind of proceeding.

There was great fear by history's view—now probably stupid fear; but there was real fear that communists were taking over the country in 1950, and national hearings were held to go and find them.

There was a real fear. These were national hearings. They were trying to take care of running a government. People came up and took the 5th Amendment. They were trying to be protected. I'm not saying historically we lived in fear; but there was a real fear and a real government interest.

I don't doubt that the Court has a real interest, totally appropriate under the Juvenile Court Act for the well-being of the child. But that is precisely when the 5th Amendment applies, when the person fears that that real interest can translate into a prosecution.

THE COURT: There is no question that the the lady has [18] the right to assert her claims under the 5th

Amendment; and we are not dealing with how an American acts.

MR. LIPMAN: I understand those are real fears here.

THE COURT: But this Court asserted jurisdiction over this child in May of 1987; and it has been continuous, uninterrupted since then. That child still is under the jurisdiction of this Court; and this Court orders, properly so, the production of that child.

It ordered that and issued an Order to the custodian of that child to bring it before this Court. That Order has not been obeyed. The Order is not going to be berated by an assertion here that the Court believes is not complete.

They're ways that this lady can purge herself of the contempt of this Court that does not involve her testimony. It did not take too inventive of a mind to create circumstances in which we can have this Court's curiosity and its Order affirmed.

Under those circumstances, this Court is not going to relinquish it's previously issued Order. It will stand. She is in Contempt of this Court, and it continues until that child is produced.

Remember the Court finds persuasive, the reason that has been presented to it in the memoranda from the Department of Social Service, and the child's representative. It has also found the cases referred to persuasive.

It is not to say, that Miss Bouknight cannot have a 5th [19] Amendment privilege, though there have been instances throughout this case, prior to Mrs. Bouknight even coming to court, where her words have been presented on the record.

We go directly to the comment made by Miss Parsons, in the proceeding before Judge Angeletti, when she said she had just spoken with the mother. The mother said, I have the baby, and I will bring him to court. The child

did not appear in court, and the mother also did not appear in court. Those were proceedings before Judge Angeletti.

We go to the situation where on several occasions, this lady's words have been brought into court, prior to her ever coming into court. She is now here; and she invokes her 5th Amendment privilege.

Obviously, this Court is not going to ask her one question. You have advised the police department. And if they asked her questions, it would be stupidity on their part if they continue to question her. I don't think the methods of the Baltimore City Police Department or the prosecution through the State's Attorneys Office could be that insane.

So, if they are, whatever value they gain from the information received, will not assist them in the prosecution in all likelihood.

Those issues, however, are not of interest to me. Her 5th Amendment privilege is interesting to me; and I will protect it.

[20] What I want, as a Judge of the Circuit Court for Baltimore City, Division for Juvenile Cases, is enforcement of the Order, lawfully issued for the production of this child, pursuant to 3815-C as well as the previous Order, signed by Judge Johnson, placing this child in the protective supervision of this lady.

Your request to quash the Order of Contempt is denied. The Order of Contempt will continue. We will make sure that your record is complete. If an Appellate Court wants to look at this thing; and frankly, the Court invites their perusal because this is an important question, we will protect it.

MR. LIPMAN: Thank you, very much.

MR. MERVIS: Nothing for the child.

MS. BLIMLINE: Nothing for the Department, Your Honor.

THE COURT: The Order of Contempt continues. Miss Bouknight is free to purge herself of contempt at any time, through the production of the child, Maurice M . Pending that production, she will remain in the custody of the Baltimore City Jail, without bail.

This Court will always be available. If this Judge is not available at any moment to receive the child and in the satisfaction of the Court's Order, there are judges available on weekends and during holidays.

If there is the production of the child and it becomes known to the Department of Social Services, the child's [21] representative, or anyone with knowledge of that child, they simply either call the Baltimore City Department of Social Services, the child's representative, or even counsel for the mother and present the information.

If they need to reach this member of the Court, personally, after hours, you may simply call the 396-3100, which is the City Hall operator. They have my home phone number, and they will try to reach me. There is a Duty Judge, assigned by the Circuit Court on rotating weeks, District Court on option weeks.

The Judge is always available to release this lady from jail upon her purging herself of the Order of Contempt.

If you need the Clerk of the Court for assistance and access to the record of the court, Mr. James Benton is listed in the telephone book, and the Court is positive, he will be available 24 hours a day.

There is, also, a clerk of this court whose available 24 hours a day and on duty to assist any party who has an emergency matter that needs to be brought to the attention of the Court.

We stand fully ready at a moment's notice to release her under the contempt. We do not seek to hold her for one second longer than we have to. I will not release her pending until the child is produced. Thank you.

POLICE DEPARTMENT
Baltimore, Maryland

MISSING PERSON

Name: Maurice M
DOB: 10/3/86
3'0", 25 lbs
Black Hair, Brown Eyes

This agency is attempting to locate the above child who was last seen in September 1987.

Anyone having information is requested to contact The Missing Persons Unit at (301) 396-2334 or the Homicide Unit at (301) 396-2721

For Law Enforcement Use Only

PETITIONER'S

BRIEF

No. 88-1182

Supreme Court, U.S.
FILED
JUN
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

On Writ Of Certiorari To The Court of Appeals of Maryland

BRIEF FOR PETITIONER

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63 pp

QUESTIONS PRESENTED

1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

PARTIES BELOW

The parties in the court below were the Baltimore City Department of Social Services, appellee below and petitioner here; Maurice M., appellee below and petitioner in the consolidated case, No. 88-6651; and Jacqueline Bouknight, appellant below and respondent here and in No. 88-6651.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1182

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

On Writ Of Certiorari
To The Court of Appeals of Maryland

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The Circuit Court for Baltimore City (Division for Juvenile Causes) adjudicated respondent Jacqueline Bouknight in civil contempt of court for failing to produce her child, Maurice M., before the court and ordered Ms. Bouknight jailed until she purged herself of contempt. That order is unreported and is reprinted at App. Pet. Cert. 81a-82a. On appeal, the Maryland Court of Appeals, two judges dissenting, reversed the circuit court's contempt finding and ordered Ms. Bouknight's immediate release from jail.

The opinion of the Court of Appeals is reported, *In re Maurice M.*, 314 Md. 391, 550 A.2d 1135 (1988), and is reprinted at App. Pet. Cert. 15a-80a. The Court of Appeals denied the State's emergency motion for a stay of its judgment in an unreported order reprinted at App. Pet. Cert. 14a.

Then, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted the State's motion for a stay of the judgment of the Court of Appeals pending the filing and disposition of a petition for writ of certiorari. The initial order granting the stay is unreported and is reprinted at *id.* 12a-13a. The subsequent in-chamber opinion is reported, ___ U.S. ___, 109 S.Ct. 571 (1988), and is reprinted at App. Pet. Cert. 1a-11a.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on December 19, 1988. The State's petition for writ of certiorari was filed on January 18, 1989. Thus, this Court has jurisdiction. *See* 28 U.S.C. §§1257(3), 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be * * * compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE

A. Hospitalizations and juvenile court proceedings in 1987.

Maurice M. ("Maurice") was born on October 3, 1986.[1] (J.A.8.) Respondent Jacqueline Bouknight is Maurice's mother. (*Ibid.*) At age two months, Maurice was admitted to Johns Hopkins Hospital in Baltimore with chlamydia pneumonia. X-rays revealed "old" fractures of the right humerus, scapula, and glenoid. (J.A.9; 11.) Maurice was hospitalized again at less than four months of age when he was admitted to Baltimore's Francis Scott Key Medical Center on January 23, 1987, "suffering from a fracture of the left femur." (J.A.11.) Maurice remained there until February 10, 1987. (J.A.13.) While in the hospital the "mother shook baby while holding him. She was also observed dropping baby into crib with side rails up. This was when he was in his spica cast." (J.A.16.)

On February 10, Maurice was discharged from Francis Scott Key to the custody of petitioner Baltimore City Department of Social Services ("BCDSS" or "the State")[2] as BCDSS had obtained from the Circuit Court for Baltimore City (Division of Juvenile Causes) ("juvenile court") an authorization for Shelter

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[1] Consistent with the principle of confidentiality applicable to Maryland juvenile court proceedings, *see* Md. Code Ann., Courts & Judicial Proceedings Art., §3-828, Maurice's full name was not used in proceedings below and is not used here. Unless otherwise noted, all statutory references are to the Juvenile Causes Act, codified in the Courts and Judicial Proceedings Article of the Maryland Code. The relevant sections of this Act are in the appendix to this brief.

[2] BCDSS is an agency of the State of Maryland. *See* Md. Code Ann., Art. 88A, §3 (1985 Repl. Vol., 1988 Cumm. Supp.).

Care of Maurice. (J.A.10; 36.)[3] The following day, February 11, the State filed a petition in the juvenile court seeking a determination that Maurice was a Child in Need of Assistance ("CINA"). (J.A.8-10.)[4] The State's CINA petition recited Maurice's history of hospitalizations and confirmed fractures; the fact that his mother had emotional problems; and that his father had just been released from jail where he had been incarcerated for distributing cocaine. (*Ibid.*) The juvenile court granted BCDSS an Order of Shelter Care on February 11. (J.A.1.)

At a juvenile court hearing on May 19, 1987, all parties (Maurice, his mother, and BCDSS), by their respective attorneys, stipulated to the essential facts of the CINA petition. (J.A.20-21.) The facts stipulated to included that Maurice was hospitalized on January 23, 1987, with a fractured leg; that he was previously hospitalized in November, 1986, with pneumonia; that the child's father was incarcerated from June 23, 1986, to January 10, 1987, for distributing cocaine; that x-rays taken on February 4, 1987, revealed several old fractures of the right humerus, scapula, and glenoid; that when Ms. Bouknight was herself a CINA, in 1982 and 1983, she had emotional problems; that while Maurice was hospitalized, Ms. Bouknight was observed shaking him and throwing him into the crib; and that she had been verbally abusive to doctors and social workers during the investigation of alleged child

[3] *See* §§3-801(r), 3-815. This second hospitalization (January 23 - February 10, 1987) was the first notice that BCDSS had of Maurice. *See* J.A.14 ("PS [Protective Services] was contacted and the case was reported.").

[4] *See* §§3-801(e), 3-804(a).

abuse. *Compare* J.A.8-10 (petition) *with* J.A.20-21 (stipulation).

The Shelter Care Order was modified on July 17, 1987, to return physical custody of Maurice to his mother. (J.A.2; 27; 37.)[5] At a dispositional hearing on August 18, 1987, the parties agreed to the entry of an Order of Protective Supervision, finding Maurice to be a CINA, and placing him under the supervision of BCDSS, with his mother having physical custody. Under the terms of that Order, the mother agreed, *inter alia*, to "cooperate with BCDSS"; to "continue in therapy until discharged"; to "refrain from physically punishing" Maurice; and to notify the court, her attorney, and BCDSS of any change of address. (J.A.27-28; App. Pet. Cert. 85a-87a.)

B. Juvenile court proceedings in 1988.

On April 18, 1988, BCDSS filed a petition with the juvenile court for expedited review of court order. That petition represented that Maurice's father died in March, 1988, as the result of a shooting incident; that his mother has a history of drug use; and that the "mother has failed to cooperate with the BCDSS" as "she has refused to provide a current address or to inform the petitioner [BCDSS] of the whereabouts of the respondent [Maurice]." (J.A.33-35.) The following day, April 19, BCDSS filed a motion for contempt and petition for an order to show cause based on the mother's complete failure to cooperate with BCDSS

[5] At a hearing on April 20, 1988, the trial court inquired about this modification of the Shelter Care Order. (J.A.48.) Counsel for BCDSS (Ms. Blimline) informed the court that BCDSS had opposed the Master's order granting shelter care to the mother, but that no exception (appeal) was ever filed. (*Ibid.*)

as required by the agreed-to Order of August 18, 1987. (J.A.36-39.) The contempt motion further represented that BCDSS had made a home visit on April 7, 1988, and that the mother then stated that Maurice "was in the care of an aunt, however, she refused to identify the aunt or provide the whereabouts of the child."[6] The motion also represented that the mother persisted in refusing to tell BCDSS of Maurice's whereabouts. (J.A.37-38.)

On April 20, 1988, a hearing was held before a juvenile court master on the BCDSS petition to review court order. Ms. Bouknight failed to appear at that hearing; the master recommended that a bench warrant be issued; and BCDSS was granted an Order of Shelter Care for Maurice. (J.A.4.) Later that same day, the court (Edward J. Angeletti, Judge) held a hearing on the motion for contempt. (J.A.40-57.) At that hearing, all parties appeared through counsel, but neither Ms. Bouknight nor Maurice was present. Ms. Bouknight's counsel informed the court that she had talked with her client and explained the importance of Ms. Bouknight appearing in court with Maurice. (J.A.42; 47.) Ms. Bouknight told her counsel that she would be in court. (J.A.42.)[7] The court was informed

[6] In the motion, BCDSS also informed the court that the Baltimore City Police Department was contacted on April 2, 1988, and that a Missing Persons Report was filed. (J.A.38.) The "mother misinformed the investigating officer that the Respondent [Maurice] was in the care of an aunt Louise Perry, however, Ms. Perry denies seeing the Respondent." (*Ibid.*) The case was then referred to the Homicide Division. (*Ibid.*)

[7] Counsel for Ms. Bouknight asserted that "there is no evidence or no indication anything is wrong with the baby." (J.A.44.) *See also* J.A.45-46 ("I had no reason to think and still don't have any reason to believe there is anything wrong.").

that no one from BCDSS had seen Maurice since September, 1987, and that other than a maternal aunt who reportedly had seen him in February, 1988, no other family member had seen him since the previous summer. (J.A.43.)

At the conclusion of the hearing, the court issued an order for Ms. Bouknight to show cause why she should not be held in contempt and issued a warrant for her immediate arrest. (J.A.56-59; App. Pet. Cert. 83a-84a.) The court stated its intention to hold her in jail if upon her arrest she failed to produce Maurice. (J.A.55.) Ms. Bouknight's attorney agreed that the court had no other alternative. (J.A.55-56.)

Ms. Bouknight was arrested and brought before the court (David B. Mitchell, Judge) on April 27, 1988. (J.A.60-68.) Ms. Bouknight was represented by counsel. (J.A.60.) When asked by the court about Maurice's whereabouts, Ms. Bouknight responded that Maurice was with her sister, Barbara Bouknight, at 3417 Denton Avenue, Dallas Texas. (J.A.65-66.) Neither Ms. Bouknight nor her counsel raised any objection, constitutional or otherwise, to the court's inquiry. The court held Ms. Bouknight in jail pending verification of her statements that Maurice was with her sister in Dallas. (J.A.66-68.)

Judge Mitchell held a further hearing the next day, April 28. (J.A.69-75.) The court was informed that the Dallas police had contacted "a Barbara Bouknight, but that she has not seen the child ever." (J.A.70.) Ms. Bouknight, through counsel, continued to insist that Maurice was in Dallas. (*Ibid.*)[8] The court noted

[8] *See* J.A.70: "MS. PARSONS [counsel for Ms. Bouknight]: On

that Ms. Bouknight was continuing her pattern of giving various authorities incorrect information on the whereabouts of Maurice. (J.A.71-74.) The court found Ms. Bouknight in civil contempt and entered an order to that effect. (App. Pet. Cert. 81a-82a.) The hearing concluded by the court asking Ms. Bouknight if she wished to purge herself of contempt "by producing the child." (J.A.74.) Her counsel answered for her in the negative. (J.A.75.) Thus, Ms. Bouknight was returned to jail.

Judge Mitchell held a further hearing on May 18, 1988. (J.A.103-142.) That hearing was the first occasion on which Ms. Bouknight's counsel asserted a Fifth Amendment objection to the court's civil contempt finding.[9] The court nevertheless refused to lift

behalf of my client, she absolutely insists that the child is there, and said if they just go to the home and look, the child is there. She absolutely insists that he's there." *See also* J.A.72 (same). The court also received the report of the court's Chief Medical Officer. (J.A.75; 76-77.) That report concluded "that Ms. Bouknight understands the nature and consequences of the charges against her and is able to assist her attorney in her defense." (J.A.76.) Ms. Bouknight had informed the physician "that the child is with her sister at 3417 Denton Avenue, Dallas, Texas." (J.A.77.)

[9] At the April 28 hearing, Ms. Bouknight's counsel did say that perhaps the opportunity being afforded her client to purge herself of contempt was not "even a constitutional one, if her purging herself may involve admitting to a crime of some sort." (J.A.72.) Counsel did not press this point any further than that, nor did she argue why the opportunity was not a constitutional one, as she was continuing to "insist" that Maurice was in Dallas. (J.A.70; 72.) And certainly, no Fifth Amendment objection was lodged at the April 27 hearing when Ms. Bouknight responded, without objection, to the court's inquiry, and stated, albeit falsely, that Maurice was with her sister in Dallas. (J.A.66.)

its contempt finding, but granted the parties the opportunity to submit memoranda on the Fifth Amendment claim.[10] Following receipt of the parties' respective legal memoranda, Judge Mitchell held another hearing on May 26, 1988. (J.A.145-159.) After argument, the court rejected Ms. Bouknight's Fifth Amendment claim, finding that Maurice "is under the jurisdiction of this Court; and this Court orders, properly so, the production of that child." (J.A.157.)[11] The court noted that Ms. Bouknight could purge herself of contempt without giving any testimony. (*Ibid.*; *see also* J.A.155 (noting that the child could come into court "with the grandmother, with the local priest, or with a physician, it matters not".)) The court also noted the prior representations that had been made that Maurice would be produced in court. (J.A.157-58.) The court continued its order of contempt and Ms. Bouknight remained in jail. (J.A.159.)

C. Appellate proceedings.

Ms. Bouknight appealed the contempt order to the state intermediate appellate court, and thereafter filed a petition for a writ of certiorari and a request for expedited consideration with the Court of Appeals, the highest court in Maryland. The Court of Appeals granted the petition and heard the case on an expedited basis. On December 19, 1988, the Court of Appeals, two judges dissenting, reversed the juvenile court's contempt order, holding that it violated Ms. Bouknight's Fifth Amendment privilege. App. Pet. Cert. 15a-80a (314 Md. 391, 550 A.2d 1135 (1988)).

[10] The court also continued the Order of Shelter Care of Maurice to BCDSS. (J.A.142.)

[11] As noted above, Maurice has been under the juvenile court's jurisdiction since February 11, 1987. (J.A.1; 10; 36.)

Notwithstanding its explicit recognition that the order to produce Maurice did not require Ms. Bouknight "to utter a sound, or * * * to verbally disclose Maurice's whereabouts" (App. Pet. Cert. 42a), the Court of Appeals held that the juvenile court's contempt finding violated Ms. Bouknight's Fifth Amendment rights, and thus ordered her immediate release from jail. *Id.* 53a. Within hours of the court's decision, the State filed with the Court of Appeals a motion for a stay of its judgment pending the filing and disposition of a petition for a writ of certiorari with this Court. That motion was denied the same day. *Id.* 14a.

Immediately following that denial, also on December 19, the State filed with this Court an emergency application for a stay of the judgment of the Court of Appeals. That motion was granted on December 19 by Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit. *Id.* 12a-13a. On December 21, the stay was continued pending the filing by January 23, 1989, of the State's petition for writ of certiorari. *Id.* 1a-11a (109 S.Ct. 571 (1988) (Rehnquist, C.J., Circuit Justice)). The State filed its petition on January 18, and the petition was granted on April 3, 1989. The stay is still in effect (App. Pet. Cert. 1a-2a) and Ms. Bouknight remains in jail.

SUMMARY OF ARGUMENT

This case involves important questions concerning individual rights, judicial power, and the protection of children. The importance of these questions, however, is not equalled by their difficulty either as a matter of traditional Fifth Amendment doctrine or as a matter of social policy. For a people who aspire to a just society under the rule of law, there is no alternative but to reverse the decision below. This Court should not countenance a reading of the Constitution of the United States which holds that the courts of this country cannot protect the rights of totally innocent and literally defenseless children.

The Fifth Amendment privilege against self-incrimination protects only against the compelled production of self-incriminating testimony. Here, Ms. Bouknight can comply with the juvenile court's order and produce Maurice without uttering a sound to any representative of the State. Further, the only fact communicated by Ms. Bouknight's compliance with the juvenile court's order is that she has custody of her own infant child, and this undisputed fact has no testimonial significance. Therefore, the Fifth Amendment is not implicated, let alone violated, by the order.

Moreover, even if the order to produce involved compelled testimony, and would ordinarily implicate the Fifth Amendment privilege, Ms. Bouknight's privilege claim is overcome by society's overwhelming interest in protecting children at risk of serious injury. The privilege is not a constitutional straightjacket which bars the government, including the judiciary, from protecting a child. The court below failed to accord the proper weight to the multiple rights and obligations at issue in this case. Maurice's right to freedom from bodily harm and the State's obligation to protect that right are fundamental societal values which outweigh Ms. Bouknight's marginal Fifth Amendment claim. Where, as here, there is a direct conflict between a parent's asserted rights and her infant child's manifest right and need for protection, the juvenile court must have the power to compel an

unwilling parent to produce her child before the court. Absent that power, this child is at the mercy of a parent who, as the undisputed facts of this case demonstrate, is unable to protect him from gross harm.

ARGUMENT

I. THE JUVENILE COURT'S ORDER DIRECTING MS. BOUKNIGHT TO PRODUCE MAURICE M. IN COURT DOES NOT VIOLATE HER FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Ms. Bouknight can comply with the order to produce without giving any testimony.

The Fifth Amendment to the Constitution of the United States provides, in relevant part, that "[n]o person * * * shall be compelled in any criminal case to be a *witness* against himself".[12] (Emphasis added.) Consistent with the text of the amendment, "the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Fisher v. United States*, 425 U.S. 391, 409 (1976). Unquestionably, the State seeks Ms. Bouknight's compliance with the court's order to produce Maurice. The State also recognizes that she may have a reasonable fear of incrimination.[13] Nevertheless, Ms. Bouknight's Fifth Amendment claim fails because complying with the court's order does not make her a "witness" and producing Maurice is not a "testimonial communication" within the meaning of the Fifth Amendment.

[12] This guarantee is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964).

[13] The undisputed facts regarding Maurice's history, including the injuries he has suffered, and the fact that no one has come forward and produced him since his mother was jailed in April, 1988, suffice to make a fear of incrimination reasonable. *See Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). In the courts below, the State did not dispute the possibility that Maurice may have suffered grievous harm and that his mother might be criminally culpable, and the State does not dispute that possibility here. In fact, the only party to claim in the juvenile court that there was no evidence that "anything is wrong with the baby" was the mother, through her counsel. (J.A.44; 45-46.) Nonetheless, the State asserts here, as it did below, that the Fifth Amendment is not implicated by the juvenile court's order to produce because she can comply without giving any testimony and because there is no testimonial significance attributable to Ms. Bouknight's compliance with the order. *See infra*.

In its civil contempt order of April 28, 1988, the juvenile court found that Ms. Bouknight is the mother of Maurice; that she is "in contempt of the order of this court for failing to produce him before the court or to reveal his exact whereabouts." App. Pet. Cert. 82a. The order further provides that she shall remain in jail until "she purges herself of contempt by either producing Respondent [Maurice] before the court or revealing to the court his exact whereabouts," and that she "may purge herself at anytime by providing said Respondent or information about him to the Baltimore City Department of Social Services or the Baltimore City Police Department in addition to this court." *Ibid.*

The juvenile court was explicit that it was not requiring Ms. Bouknight to give testimony against herself. *See, e.g.*, J.A.155-56 ("The Order of this Court is for the production of that child. I do not know how that in any way is probing, whatever, might be in this lady's mind. I am not concerned about her

testifying in these proceedings."). Ms. Bouknight has always had the opportunity to avoid contempt and going to jail, and now to purge herself of contempt, *by simply producing the child*. Even though she is now in jail, Ms. Bouknight has never claimed—because she cannot claim—that she must speak to any representative of the State to comply with the order. She has access, both in person and by telephone, to her counsel to whom she could give information that would lead to Maurice being produced in court.[14]

This Court has consistently and repeatedly limited the right of a person to claim Fifth Amendment protection to true "testimonial communications." Therefore, a suspect may be compelled to furnish a blood sample, *Schmerber v. California*, 384 U.S. 757, 765 (1966); to provide a hand-writing exemplar, *Gilbert v. California*, 388 U.S. 263, 266-67 (1967), or a voice exemplar, *United States v. Dionisio*, 410 U.S. 1, 7 (1973); to stand in a lineup, *United States v. Wade*, 388 U.S. 218, 221-22 (1967); to wear particular clothing, *Holt v. United States*, 218 U.S. 245, 252-53 (1910); and to execute a consent form authorizing the release of bank records, *Doe v. United States*, 487 U.S. ___, 108 S.Ct. 2341 (1988) ("*Doe II*"). Thus, "it is not merely any and every *compulsion* that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial* compulsion. The latter idea is as essential as the former." 8 Wigmore, *Evidence*

[14] If Ms. Bouknight were to tell her counsel of the whereabouts of Maurice, that verbal communication would be unavailable to the State as it would be a privileged attorney-client communication. *See Fisher*, 425 U.S. at 396.

§2263 at 379 (McNaughton Rev. 1961) (emphasis in original).[15]

The court below held that Ms. Bouknight could comply with the order to produce without "utter[ing] a sound. . . ." App. Pet. Cert. 42a. Nevertheless, focusing almost exclusively on the potentially incriminating character of the act of producing Maurice, it failed to distinguish between "testimony" and "nontestimonial conduct."[16] If an act is not "testimonial", the Fifth Amendment is inapplicable, *see, e.g., Fisher*, 425 U.S. at 409, and an act does not become testimonial simply because it carries with it even great likelihood of incrimination. *See, e.g., Schmerber*; *see also* 8 Wigmore, *Evidence* §2263 at 379. Potential incrimination is a necessary, but not sufficient, condition for invoking the Fifth Amendment privilege.

Suspects who are required to furnish a blood sample (*Schmerber*), or stand in a lineup (*Wade*), or wear particular clothing (*Holt*) are compelled to communicate something to their potential accusers, and they

[15] *See also id.* at 378 ("The *history* of the privilege—especially the spirit of the struggle by which its establishment came about—suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence.") (citation omitted) (emphasis in original).

[16] Thus, the court below "confuses the requirement that the compelled communication be 'testimonial' with the separate requirement that the communication be 'incriminating.' If a compelled statement is 'not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence.' " *Doe II*, 108 S.Ct. at 2346 n.6 (citation omitted).

may well be incriminating themselves. However, because they are not testifying, they cannot refuse on Fifth Amendment grounds to perform these compelled acts. *See, e.g., New York v. Quarles*, 467 U.S. 649, 666 (1984) (O'Connor, J., concurring in part and dissenting in part) ("Only the introduction of a defendant's own *testimony* is proscribed by the Fifth Amendment's mandate that no person 'shall be compelled in any criminal case to be a witness against himself.' That mandate does not protect an accused from being compelled to surrender *nontestimonial* evidence against himself.") (emphasis in original).

The Fifth Amendment prohibits the government from proving "a charge against an accused out of his own mouth" and protects "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . ." *Malloy v. Hogan*, 378 U.S. at 8. "It is extortion of information from the accused himself that offends our sense of justice." *Couch v. United States*, 409 U.S. 322, 328 (1973). None of these important principles is offended by government compulsion which requires a person to perform a nontestimonial act.

Justice Goldberg's opinion for the Court in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964), contains an exhaustive, and oft-cited, enumeration of the policies and historical justifications for the Fifth Amendment privilege. The common thread of all these justifications is protection of the individual from being forced to *speak* in response to governmental compulsion. *See id.* at 55 ("Most, if not all, of these policies and purposes are defeated when a *witness* 'can be whipsawed into incriminating himself. . . .' ") (citation omitted) (emphasis added). The

first, and historically perhaps the most important, of the policies identified by Justice Goldberg is "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt. . . ." *Ibid.*[17] That rationale obviously applies only to testimonial statements by a witness and has no applicability to a mother ordered to produce her child in court. There is no self-accusation in the act of producing one's own infant child, and there certainly is no possibility of perjury as a result of doing so.

Malloy v. Hogan also strongly supports the view that the historical policies underlying the privilege limit its applicability to verbal testimony. The cases principally relied upon in *Malloy* to hold that the Fifth Amendment privilege applies to the States, through the Due Process Clause of the Fourteenth Amendment, are cases barring the use of coerced confessions in state criminal prosecutions. 378 U.S. at 6-8 (*citing, e.g., Brown v. Mississippi*, 297 U.S. 278 (1936)). A coerced confession is inadmissible because it violates

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[17] The other policies identified by Justice Goldberg are "our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' " *Ibid.* (citations omitted.)

the principle that an accused is privileged from incriminating himself by his own words. That rationale was not offended in *Schmerber*, *Gilbert*, *Wade*, or *Dionisio*, and it is not offended here.

In *Doe II*, the Court again concluded that "the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." 108 S.Ct. at 2348. This "was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source." *Ibid*. The juvenile court never sought to extract from Ms. Bouknight "a sworn communication of facts which would incriminate" her.

This Court's decisions in *Dionisio* and *Doe II* suffice to answer the claim that Ms. Bouknight cannot be compelled to produce Maurice because that act may have some minimal verbal component. Against Fifth Amendment attack, *Dionisio* upheld the government's right to compel a specifically identified criminal suspect to give a voice exemplar, and *Doe II* upheld the compelled execution of a bank consent form authorizing foreign banks to release information on a suspect's accounts. Both of these compelled acts involve far more verbal and traditionally recognizable communicative content than does requiring a parent to produce her infant child in court. Nevertheless, the government was entitled to compel the suspects to give the voice exemplar (*Dionisio*) and execute the form (*Doe II*) because neither act was testimonial. *See, e.g., Doe II*, 108 S.Ct. at 2349 n.11 ("If the societal interests in privacy, fairness, and restraint of governmental power are not unconstitutionally offended by compelling the accused to have his body serve as evidence that leads to the development of highly incriminating testimony, as *Schmerber* and its progeny make clear, it is difficult to understand how compelling a suspect to make a nonfactual statement that facilitates the production of evidence by someone else offends the privilege.").

B. The act of producing Maurice has no testimonial significance.

The court below concluded that should Ms. Bouknight comply with the court's order, she "will necessarily admit a measure of continuing control and dominion over Maurice's person." App. Pet. Cert. 41a. It failed, however, to recognize that this adds nothing to Ms. Bouknight's Fifth Amendment claim. Ms. Bouknight has never disputed that she has "a measure of continuing control and dominion over Maurice's person." As a result of action of the juvenile court, Maurice was returned to her physical custody in July, 1987 (J.A.2; 27; *see also* App. Pet. Cert. 85a-87a (Order of Protective Supervision)), and at court hearings in April, 1988, she and her counsel asserted knowledge of his whereabouts. (J.A.65-66; 70-72.)[18] "Control and dominion over Maurice's person" is, therefore, an undisputed "foregone conclusion" and of "minimal testimonial significance." *Fisher*, 425 U.S. at 411-12.

In *Fisher*, the Court rejected a taxpayer's Fifth Amendment challenge to production of an accoun-

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[18] *Accord* App. Pet. Cert. 67a (McAuliffe, J., dissenting) ("[T]he mother had on at least two occasions freely admitted her continuing control of the child at the very times she was required to produce him.").

tant's workpapers. That holding was based on the fact that "the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination." *Id.* at 411. No constitutional rights were touched because "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Ibid.* The Court went on to compare the testimonial insignificance of this act of compelled production with giving a handwriting exemplar:

> When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege.

Ibid. Finally, as the Court noted, "it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer." *Id.* at 412.

All the factors noted in *Fisher* are present here. Producing Maurice—the only thing which Ms. Bouknight is compelled to do—does not involve any testimony, but is merely the "surrender" of a child in response to a court order. *See In the matter of Harris*,

221 U.S. 274, 279 (1911). In "surrendering" Maurice in response to the court's order, the most which can be claimed is that Ms. Bouknight would be conceding something about his existence, possession, or identification. *See Fisher*, 425 U.S. at 410-13. These concessions involve no realistic threat of self-incrimination because they are "self-evident", *see id.* at 411. Ms. Bouknight does not dispute Maurice's existence (and it can be proven without any testimony from her by voluminous other evidence, *e.g.*, medical records (J.A.11-18)); she does not deny possession (custody) of Maurice (*see, e.g.*, App. Pet. Cert. 85a-87a (Order of Protective Supervision); J.A.65-66); and if he is produced, he can be identified without any testimony from Ms. Bouknight by, for example, comparison with photographs (J.A.160) and x-rays (J.A.11-16).[19] And finally, to state the obvious, "it is not illegal" for a parent to have custody of her child. That, too, is "self-evident" and a "truism." *See Fisher*, 425 U.S. at 411.

United States v. Doe, 465 U.S. 605 (1984) ("*Doe I*"), a case relied upon by the court below, does not aid Ms. Bouknight. *Doe I* held that a sole proprietor had a Fifth Amendment right not to produce documents, but no privilege as to the contents of the documents. That holding was based on an explicit factual finding "that the act of producing the documents would involve *testimonial* self-incrimination."

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[19] *See also United States v. Clark*, 847 F.2d 1467, 1471 (10th Cir. 1988) ("The Court in *Fisher* concluded that compelled production of accountant's workpapers in the taxpayer's possession posed no realistic or substantial threat of self-incrimination in any of the categories listed: existence, possession, or authentication.").

465 U.S. at 613 (emphasis added).[20] Unlike the instant case, however, the government in *Doe I* could not show "that possession, existence, and authentication were a 'foregone conclusion.'" *Id.* at 614 n.13 (*quoting Fisher*).

The crucial distinction between this case and *Doe I* is that Ms. Bouknight's compliance with the order would not add to the sum of the State's knowledge about Maurice's existence, possession, or identification. *See id.* at 613 n.12 ("[W]e find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control.") (*quoting* Court of Appeals). Possession (custody), existence, and authentication (identity) of Maurice are "foregone conclusions." Ms. Bouknight would not be adding to or "making the State's case." She would simply be confirming undisputed and previously acknowledged facts (Maurice's existence and her custody). Further, just as the suspect in *Doe I* had no privilege as to the contents of the documents (as distinguished from the act of production) because he voluntarily created them, *id.* at 612, Ms. Bouknight voluntarily agreed to cooperate with BCDSS as a condition of custody, *see* J.A.27-28; App. Pet. Cert. 85a-

[20] Here, the factual findings are that Ms. Bouknight can comply without giving any testimony. *See* J.A. 157 (juvenile court finding that Ms. Bouknight can produce child without testifying) and App. Pet. Cert. 42a (Court of Appeals finding that she can comply without "utter[ing] a sound"). These factual findings are entitled to great deference in this Court. *See, e.g., Doe I*, 465 U.S. at 614; *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

87a, and thus she has no privilege to refuse to produce her child.

Ms. Bouknight has never once suggested that she cannot comply with the juvenile court's order to produce Maurice. She does not claim that the order is invalid because compliance with it is impossible. *See United States v. Rylander*, 460 U.S. 752, 757 (1983) (One found in contempt for failing to produce records "could defend the contempt charge on the ground that he was *then* unable to comply because he lacked possession or control.") (emphasis in original). Furthermore, even if Ms. Bouknight had not affirmatively asserted that she had control over Maurice,[21] as a matter of both law and common sense, she, as the only living parent of a child less than three years old, is responsible for "a measure of continuing control and dominion" over her child. The Fifth Amendment does not reduce this *de minimis* expectation of parental responsibility for an infant. *See, e.g., Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

The Fifth Amendment testimonial privilege is not violated by requiring Ms. Bouknight to produce Maurice before the court. To hold otherwise would be an "extravagant extension of the Fifth Amendment." *Holt*, 218 U.S. at 252. Ms. Bouknight is not being

[21] She has never asserted to the contrary. *See* App. Pet. Cert. 3a-4a (Rehnquist, C.J., Circuit Justice) ("There is no indication that she is unable to comply [with the court's order]. . . .").

asked to testify. She is being asked only to produce her child. There is minimal, if any, testimonial significance to that act of production.

II. EVEN IF THE FIFTH AMENDMENT IS IMPLICATED BY THE JUVENILE COURT'S ORDER TO PRODUCE MAURICE M., MS. BOUKNIGHT'S PRIVILEGE CLAIM IS OVERCOME BY THE IMPORTANT SOCIETAL INTEREST IN PROTECTING A CHILD IN JEOPARDY OF SERIOUS INJURY.

For the reasons stated above, the judgment below can and should be reversed in accordance with well-established Fifth Amendment doctrine which limits the privilege to testimonial communications. If, however, this Court holds that the order to produce implicates the Fifth Amendment, the State then seeks reversal on the alternative ground that Ms. Bouknight's Fifth Amendment privilege claim is outweighed by her child's right to protection from further harm and society's compelling and completely nonprosecutorial interest in seeking to prevent further harm to Maurice.

A. In appropriate cases, this Court has recognized that Fifth Amendment interests are overcome by compelling nonprosecutorial societal interests.

In delineating the scope of the Fifth Amendment privilege, this Court has always examined the principles underlying the privilege, the conduct involved, and the effect on society. *See, e.g., Fisher*, 425 U.S. at 410 (questions as to the application of the Fifth Amendment "perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances"). This individualized inquiry is inherent in a privilege whose scope does not coincide with the complex values it helps to protect. *See Schmerber*, 384 U.S. at 762. In *California v. Byers*, 402 U.S. 424, 427 (1971) (plurality opinion), the Court addressed this problem directly: "Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly."

Thus, for example, the Court has held that the Fifth Amendment provides no defense for failing to file a federal income tax return, *United States v. Sullivan*, 274 U.S. 259 (1927); the Fifth Amendment is not violated by a state statute which requires a person involved in an automobile accident to stop and give his name and address, *Byers*; and the Fifth Amendment does not prohibit the government from seeking information, even from a criminal suspect, in an emergency where there is an imminent threat to human life. *New York v. Quarles*, 467 U.S. 649 (1984). In all of these cases, both "testimony" and potential "incrimination" were present. Nevertheless, the privilege was held inapplicable because of the costs to an organized society of holding to the contrary.[22]

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[22] An explicit balancing approach was used by the court in *United States v. Flores*, 753 F.2d 1499 (9th Cir. 1985) (*en banc*). There, the court balanced "the government's need to regulate for the safety of its citizens, and the privilege against self-incrimination", *id.* at 1500, and rejected a Fifth Amendment challenge to the Federal Gun Control Act's requirement that a person shipping firearms give notice to the carrier. In finding that "the Fifth Amendment does not *always* demand substantial undercutting of valid and essential government regulation when

Justice Harlan's concurring opinion in *Byers* provides the framework for evaluating the competing interests in this case:

> "[T]he Constitution contains no formulae with which we can calculate the areas within this 'full scope' to which the privilege should extend, and the Court has therefore been obliged to fashion for itself standards for the application of the privilege. In federal cases stemming from Fifth Amendment claims, the Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of the other public interests involved."

Byers, 402 U.S. at 449 (*quoting from Spevack v. Klein*, 385 U.S. 511, 522-23 (1967) (Harlan, J., dissenting)). Decisive to the analysis is "the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved. . . ." *Id.* at 458 (Harlan, J., concurring).

Ms. Bouknight's Fifth Amendment claim must be judged, therefore, against substantive Fifth Amendment standards and against the impact on an orga-

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the means to effect that regulation necessarily include disclosure of information which *could* lead to self-incrimination", *id.* at 1501 (emphasis in original), the court noted that the challenged legislation was not enacted for a prosecutorial purpose, but for the purpose of protecting citizens. *See id.* at 1502 ("The Act is not directed at catching illegal firearm exporters at the airport, but rather at helping the individual states regulate firearm distribution for the safety of their citizens by shutting off the flow of weapons across their borders.").

nized society of giving full recognition to her privilege claim. As demonstrated above, if testimonial "disclosures" are "involved" here at all, they are extremely minor in character and involve entirely uncontroverted matters. Thus, Ms. Bouknight's "claim to constitutional protections" is extraordinarily thin and attenuated while the public interest is overwhelming. She is not being asked to testify; no verbal statements and no confession are sought. Those matters are the core of the Fifth Amendment. At its best, Ms. Bouknight's claim is at the far outer fringe of the constitutional guarantee, well beyond any previously recognized privilege claim. If the order to produce implicates the Fifth Amendment, it does so in a very minimal way, and that fact must influence how the balance is struck between Ms. Bouknight's rights and those of her child and society.

Further, our constitutional scheme encourages, as well it should, governmental action to protect the public in an emergency. Individuals do not enjoy absolute freedom because absolute individual freedom translates into public chaos. The First Amendment, for example, "would not protect a man in falsely shouting fire in a theatre and causing a panic," *Schenck v. United States*, 249 U.S. 47, 52 (1919), nor does it bar compulsory vaccinations, notwithstanding a person's contrary religious views. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The Fourth Amendment grants no right to carry explosives on a commercial airliner, *see National Treasury Employees Union v. Von Raab*, ___ U.S. ___, 109 S.Ct. 1384, 1395 n.3 (1989), nor does it bar drug-testing of government employees who apply for promotion to positions involving interdiction of illegal drugs or carrying a firearm. *National Treas-*

ury Employees Union.[23] Likewise, the Due Process Clause of the Fifth Amendment does not prohibit "the summary destruction of property without prior notice or hearing for the protection of public health", *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950), and the Self-Incrimination Clause is not a barrier to information necessary to save human life:

> If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only where police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior,

[23] There are few, if any, absolutes in constitutional law. Read literally, the Sixth Amendment, for example, would bar all hearsay in criminal trials. Yet, because "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case", hearsay is permitted. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (citation and quotation omitted). In the Fourth Amendment context, this Court has "not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context." *Skinner v. Railway Labor Executives Assoc.*, ___ U.S. ___, 109 S.Ct. 1402, 1414 (1989), *citing, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of probationer's home).

> nothing in the Fifth Amendment • • • proscribes this sort of emergency questioning.

Quarles, 467 U.S. at 686 (Marshall, J., dissenting).

In *Quarles*, the Court held that police could question a subject in custody without advising him of his *Miranda v. Arizona*, 384 U.S. 436 (1966), rights in order to locate a gun posing an immediate threat to the public. The emergency here is no less *and* was established in a judicial proceeding, not in the heat of a police interrogation. Here, the only possible means of ensuring Maurice's safety was to compel his mother to produce him. When she failed to comply with the agreed-to Order of Protective Supervision and lied to BCDSS and the juvenile court about Maurice's whereabouts, an emergency existed and the threat of imminent serious injury was established.

Ms. Bouknight's Fifth Amendment claim must be scrutinized by evaluating the substantiality of the claim in light of the values and policies of the constitutional privilege and the social costs of recognizing the privilege. Where, as here, the claim is at the fringe of any prior understanding of what constitutes "testimony" and where the government's purpose is plainly nonprosecutorial and in pursuit of compelling societal interests, the social costs of recognizing the privilege deserve great weight. *Cf. Braswell v. United States*, 487 U.S. ___, 108 S.Ct. 2284, 2294 (1988) (noting the impact on the government's effort to fight "white collar crime" of recognizing a Fifth Amendment privilege on the part of records custodians of collective entities).

B. Ms. Bouknight's privilege claim is outweighed by society's compelling and nonprosecutorial interest in protecting children.

Clearly, the privilege claim was asserted here "in 'an essentially noncriminal and regulatory area of inquiry.' " *Byers*, 402 U.S. at 430 (citations omitted). The State's coercive power was focused on Ms. Bouknight not as a criminal suspect. Rather, the undisputed facts of this case are that Ms. Bouknight's child, at an extraordinarily tender age, had suffered serious injuries of a highly suspicious origin; those injuries were reported to BCDSS as required by state law, *see* Md. Code Ann., Family Law Art., §5-903; that report resulted in juvenile court proceedings in which the mother, represented by counsel, stipulated to all the essential facts (J.A.20); and then the court, again with the consent of the mother and her counsel (J.A.27-28), found that Maurice "is a Child in Need of Assistance" and entered an order placing him under "an Order of Protective Supervision to the Department of Social Services of Baltimore City (BCDSS) for placement with mother," and the mother agreed to "cooperate with BCDSS, • • • continue in therapy until discharged, • • • attend [parenting classes at the] center for infant studies, • • • continue to utilize services of parent aide, • • • [and] refrain from physically punishing the respondent [Maurice]." App. Pet. Cert. 85a-86a.[24]

[24] The juvenile court followed precisely the procedure set forth in the Juvenile Causes Act. It received a petition alleging that Maurice was within the jurisdiction of the court (J.A.8-10; 19), *see* §§3-801(e), 3-804(a); the court held hearings at which the mother was represented by counsel; the facts of the petition were not disputed (J.A.20-21); and it entered an order finding Maurice to be a CINA, but allowing the mother to have custody on a conditional basis, subject to the court's jurisdiction. App. Pet. Cert. 85a-87a.

Thus, the Order of Protective Supervision gave the mother physical custody and BCDSS a legal supervisory responsibility, with all parties (Maurice, BCDSS and the mother) subject to the court's jurisdiction. That Order determines the weight to be given to Ms. Bouknight's subsequent privilege claim. Since it was only because of the Order and Ms. Bouknight's explicit agreement to cooperate with BCDSS that custody of Maurice was returned to her, she has no absolute right to refuse to "cooperate" by not producing the child. *See Shapiro v. United States*, 335 U.S. 1, 33 (1948) (privilege unavailable to custodian of "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established") (footnote and quotation omitted); *Curcio v. United States*, 354 U.S. 118, 123-24 (1957) ("A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial [sic] powers.").

BCDSS petitioned the juvenile court for an order for Ms. Bouknight to show cause why she was not in contempt of the Order of Protective Supervision because of her total failure to "cooperate" with the agency when she failed to reveal the whereabouts of Maurice. (J.A.36-39.) That petition, in turn, resulted in the order to produce. (J.A.74.) Once Ms. Bouknight refused to produce Maurice, a child over whom the court had jurisdiction precisely because he had been

found to need the court's assistance, the juvenile court had a choice. The court could have admitted defeat and impotence when challenged by this defiant parent who had custody only because she agreed to cooperate, or it could proceed in contempt as authorized by the Maryland legislature:

> If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.

Section 3-814(c).[25]

Here, there was an entirely "noncriminal governmental purpose in securing the information" of Maurice's whereabouts and that noncriminal purpose was in pursuit of the most compelling societal objectives—protection of a child. The noncriminal governmental purposes in *Byers*, principally civil responsibility for traffic accidents, are worthwhile, but pale in comparison to the interests at stake in this case. More-

[25] The court below perceived another, but plainly illusory, alternative. It concluded that "Bouknight's conduct may be criminally punishable under §3-831 of the Court's Article." App. Pet. Cert. 53a. *See also id.* 42a n.3. This conclusion is inexplicable on two grounds, one practical and one constitutional. Criminal prosecution is hardly a practical solution because it is not a speedy way to obtain a child who may be at imminent risk. Further, if Ms. Bouknight's conduct is constitutionally immunized, and that is the holding below, it is difficult to see how she can be prosecuted for this "constitutionally protected" activity.

over, the interests here can only be protected by a system of judicially-enforced parental self-reporting.[26]

There can be no dispute that protection of children is a compelling State interest. The State is entitled, if not required, to act to protect children, even over parental objections, so long as the State acts consistently with Due Process. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972). The State must act to protect children because the condition of being a child does not warrant denial of the historic liberty interest in freedom from harm. *See Ingraham v. Wright*, 430 U.S. 651, 673-75 (1977); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842-47 (1977); *In re Gault*, 387 U.S. 1 (1967). It is the inherent dependency of a child, especially an infant, *see Lehman v. Lycoming County Children's Ser-*

[26] These interests cannot be protected, for example, by a grant of transactional or use immunity to Ms. Bouknight. First, while this matter was pending in the state courts, there was absolutely no authority in Maryland law to grant immunity in a case such as this. *See generally In re Criminal Investigation No. 1-162*, 307 Md. 674, 683, 685 n.5, 516 A.2d 976, 982 n.5 (1986) (noting that immunity in Maryland is purely statutory and restricted to enumerated crimes, none of which are applicable here). A broader immunity statute was enacted recently, effective July 1, 1989, *see* 1989 Laws of Maryland, Ch. 288 (copy in appendix), but it too is inapplicable. This new law does not apply to juvenile court CINA proceedings, but is limited to "a criminal prosecution or a proceeding before a grand jury of the State. . . ." *Id.* §B(1). Finally, even if the State could grant immunity here, it would be manifestly unwise for it to do so as that would require the State to accede to Ms. Bouknight's "extravagant extension of the Fifth Amendment" (that the act of production is testimonial and that her privilege claim is not outweighed by far more compelling interests), notwithstanding its strong views to the contrary.

vices Agency, 458 U.S. 502, 510-11 (1982), which mandates that the Fifth Amendment not be read as precluding protection of Maurice.

Normally, custodial responsibility rests with a child's parents, but when, as here, it is the parent who creates the risk of serious injury, the State must step in to ensure that the child's basic needs are met:

> Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.

Schall v. Martin, 467 U.S. 253, 265 (1984) (citations omitted). *See also H.L. v. Matheson*, 450 U.S. 398, 446 n.46 (1981) (Marshall, J., dissenting) ("The State traditionally exercises a *parens patriae* function in protecting those who cannot take care of themselves."); *Prince*, 321 U.S. at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."); *Ginsberg v. State of New York*, 390 U.S. 629, 640 (1968) ("The State also has an independent interest in the well-being of its youth.").

To fulfill these responsibilities, states have broad authority to enact and enforce appropriate legislation to protect children against impending dangers, notwithstanding parents' rights. *Ibid.*[27] The Maryland

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[27] This role of the state as *parens patriae* has a long history, tracing its origins to English common law. *New York Foundling Hospital v. Gatti*, 203 U.S. 429, 439 (1906); *see generally*, Areen, *Intervention between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 896-912 (1975) (tracing the development of *parens patriae* in the United States).

General Assembly has accepted its responsibility in this area and enacted the Juvenile Causes Act, a comprehensive statutory scheme to fill the void created by defaulting parents. The fulcrum of that scheme, as this case demonstrates, is the juvenile court. The purposes of the Act include the following:

> To provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;
>
> • • •
>
> If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. . . .

Sections 3-802 (a)(1), (4).[28]

The State should not be expected to shoulder the responsibility of child protection, with the attendant

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[28] *See generally In re Neil C.*, 308 Md. 391, 397, 521 A.2d 329, 332 (1987) ("the legislature enacted the Juvenile Causes subtitle to protect children and promote their best interest"); *In re Jessica M.*, 312 Md. 93, 111, 538 A.2d 305, 314 (1988) (" 'This best interest standard is firmly entrenched in Maryland and is deemed to be of transcendent importance.' ") (*quoting Ross v. Hoffman*, 280 Md. 172, 174-75, 372 A.2d 582 (1977)).

potential liability in tort for failing to provide adequate protection,[29] while simultaneously having its ability to protect a child so severely constrained by an expansive interpretation of the Fifth Amendment as to make the State's task impossible. "[T]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. . . ." *Allen v. Illinois*, 478 U.S. 364, 375 (1986), *quoting Addington v. Texas*, 441 U.S. 418, 431 (1979). Federalism concerns should influence the scope given to the constitutional privilege here because no serious argument can be advanced that the Fifth Amendment was ever intended to thwart a State's child protection efforts. *See generally* Friendly, *Benchmarks* (1967) 262-63 ("[I]n applying the Bill of Rights to the States, the Supreme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment or play in the joints. The 'specifics' simply are not that specific.") (footnote omitted).[30]

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[29] In *DeShaney v. Winnebago County Department of Social Services*, ___U.S. ___, 109 S.Ct. 998, 1006 (1989), the Court noted that as a result of a state's voluntary child protection efforts the state may acquire "a duty under state tort law to provide * * * [the child] with adequate protection. . . ." (*citing* Restatement (Second) of Torts §323 (1965) (one who undertakes to render services to another may be liable for doing so in a negligent manner)). The court below suggested that it shared this view. *See* App. Pet. Cert. 40a-41a ("The State is, of course, mandated to protect Maurice as a CINA under the Juvenile Causes Act. . . .").

[30] *See also id.* at 257 (noting that the tragedy of the kidnapping of one's child would likely alter one's views on whether, in the absence of counsel, police could question a suspect in an effort to locate child).

Consistent with the states' *parens patriae* responsibility for children, other state courts in situations similar to that of the instant case have held that a parent's interest cannot outweigh the child's. *See, e.g., People v. Salinas*, 182 Cal.Rptr. 683, 692 (Cal. Ct. App. 1982) ("In balancing the interests of the child's well being, particularly in an emergency situation where a life is at stake, versus the need for protecting the alleged abuser's right against self-incrimination, we believe there is no question that the former interest outweighs the latter. '*Any other policy would reflect an indifference to human life.*' ") (emphasis added) (citations omitted); *In the Matter of the Welfare of J.W. and A.W.*, 415 N.W.2d 879, 883-84 (Minn. 1987) ("[T]he privilege [against self-incrimination] does not prohibit the state from initiating further measures for the safety and well being of * * * children. The parents cannot enjoin the state from seeking court orders keeping the children in foster care, or, if the situation should require, from seeking termination of parental rights.") (footnote omitted); *Commissioner of Social Services of New York City v. Patricia A.*, 432 N.Y.S.2d 137, 142-43 (N.Y. Fam. Ct. 1980) (if society is to care for and protect children, some burden on a parent's Fifth Amendment rights must be tolerated).

Tragically, the facts of child abuse and neglect in this case are all too typical occurrences. *See Study of National Incidence and Prevalence of Child Abuse and Neglect: 1988* (U.S. Department of Health and Human Services) at 7-1 (Between 1980 and 1986, there was "a 64% increase in countable cases of abuse and ne-

glect. . . ." It is estimated that more than 1.5 million children "were abused or neglected in 1986 throughout the U.S."); *Coy v. Iowa*, 487 U.S. ___ , 108 S.Ct. 2798, 2803 (1988) (O'Connor, J., concurring). Because many, if not the vast majority, of civil abuse and neglect (CINA) cases are potential criminal cases, the rule announced by the court below permits parents of neglected and abused children to refuse to produce the child before the court because the parent could claim "reasonable cause to apprehend danger," *see Hoffman*, 341 U.S. at 486, from producing the child.[31] The social costs of that rule are unspeakably high.

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[31] Under Maryland law, for example, child abuse is a felony. *See* Md. Code Ann. (1987 Repl. Vol.), Art. 27, §35A. The definition of criminal child abuse includes "[t]he sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent • • • under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; or (ii) sexual abuse. . . ." §35A(a)(2). A child is a "child in need of assistance" for purposes of the Juvenile Causes Act, and thus within the civil (CINA) jurisdiction of the juvenile court, if the child's "parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems. . . ." Section 3-801(e)(2). The CINA definition is obviously broader than the criminal abuse definition, and intentionally so, but equally clear is the fact that there is substantial overlap between the two. Thus, many, if not most, CINA cases could be criminal cases. This overlap between CINA cases and criminal abuse cases is confirmed empirically by the Department of Health and Human Services' *Study of National Incidence and Prevalence of Child Abuse and Neglect: 1988* at 7-5: "the most frequent form of maltreatment was physical abuse (53% of those abused), followed by emotional abuse (30%), which in turn was only slightly more prevalent than sexual abuse (24%)." At a minimum, therefore, a parent involved in a CINA proceeding in which either physical or sexual abuse is alleged, and that constitutes 74% of all the

The rigid view of the constitutional provision adhered to by the court below will also have a tremendous negative impact on governmental efforts to reunite fractured and troubled families. *See* Md. Code Ann., Family Law Art., §§5-524, 5-525(c). Here, for example, the juvenile court could have decided not to give Ms. Bouknight another chance, and BCDSS could have then proceeded to seek to terminate her parental rights. *See* Md. Code Ann., Family Law Art., §5-313. Indeed, if the court and agency cannot enforce minimal compliance with an agreed-to Order to cooperate, the only safe thing to do with a family as troubled as this one is never to return a child to the home where there are serious problems. That is not sound social policy, nor is it consistent with deeply held beliefs in this country about the importance of trying to keep families together. That, however, is the inevitable consequence of the decision below.

The Constitution should not shackle a state in its urgently important effort to protect children who, like Maurice, are in jeopardy of serious injury. States have been criticized for failing to intervene actively enough to safeguard children in severe danger from their parents. *See, e.g., DeShaney*, 109 S.Ct. at 1007-11 (Brennan, J., dissenting). The juvenile court here intervened appropriately and the State of Maryland asks that the court not be denied the requisite tools to protect a child.

When the governmental need for information is deeply rooted in compelling and traditional state in-

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cases, could claim apprehension of prosecution and such a claim would not be so patently unreasonable as to preclude, under the holding below, refusal to produce the parent's child in court.

terests and arises in a noncriminal regulatory area, the protective effect of the Fifth Amendment must be tailored accordingly. Here, the State seeks to protect the safety of a child, a plainly compelling and nonprosecutorial purpose; there is an absolute need for self-reporting for only a parent can produce her infant child; and the disclosures involved, conceding the existence, custody, and identity of Maurice, are of minimal, if any, testimonial significance.

In summary, the decision below is an unwarranted, unwise, and dangerous interpretation of the Fifth Amendment. The Fifth Amendment privilege applies only to testimonial communications, which producing the child is not, and even if the privilege is minimally implicated, Ms. Bouknight's privilege claim is overcome by Maurice's right to protection and the State's duty to protect that right. "[T]here is a difference between using the privilege as a shield against inquisitorial and unfair government practices and using it as a sword to carve a path through the laws of the land." *Flores*, 753 F.2d at 1503. The noble purpose of the Fifth Amendment—protection of the individual from the threat of an overbearing government—is not served by a rule which denies the State authority to protect children at imminent risk of harm.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals of Maryland should be reversed.

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§3-801. Definitions

(a) *In general.* - In this subtitle, the following words have the meanings indicated, unless the context of their use indicates otherwise:

(b) *Adjudicatory hearing.* - "Adjudicatory hearing" means a hearing to determine whether the allegations in the petition, other than allegations that the child requires the court's assistance, treatment, guidance or rehabilitation, are true.

(c) *Adult.* - "Adult" means a person who is 18 years old or older.

(d) *Child.* - "Child" means a person under the age of 18 years.

(e) *Child in need of assistance.* - "Child in need of assistance" is a child who requires the assistance of the court because

(1) He is mentally handicapped or is not receiving ordinary and proper care and attention, and

(2) His parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems provided, however, a child shall not be deemed to be in need of assistance for the sole reason he is being furnished nonmedical remedial care and treatment recognized by State law.

(f) *Child in need of supervision.* - "Child in need of supervision" is a child who requires guidance, treatment, or rehabilitation and

(1) He is required by law to attend school and is habitually truant; or

(2) He is habitually disobedient, ungovernable, and beyond the control of the person having custody of him; or

(3) He deports himself so as to injure or endanger himself or others; or

(4) He has committed an offense applicable only to children.

(g) *Citation.* - "Citation" means the written form issued by a police officer which serves as the initial pleading against a child for a violation and which is adequate process to give the court jurisdiction over the person cited.

(h) *Commit.* - "Commit" means to transfer legal custody.

(i) *Court.* - "Court" means the circuit court of a county or Baltimore City sitting as the juvenile court. In Montgomery County, it means the District Court sitting as the juvenile court.

(j) *Custodian.* - "Custodian" means a person or agency to whom legal custody of a child has been given by order of the court, other than the child's parent or legal guardian.

(k) *Delinquent act.* - "Delinquent act" means an act which would be a crime if committed by an adult.

(l) *Delinquent child.* - "Delinquent child" is a child who has committed a delinquent act and requires guidance, treatment, or rehabilitation.

(m) *Detention.* - "Detention" means the temporary care of children who, pending court disposition, require secure custody for the protection of themselves or the community, in physically restricting facilities.

(n) *Disposition hearing.* - "Disposition hearing" means a hearing to determine:

(1) Whether a child needs or requires the court's assistance, guidance, treatment or rehabilitation; and if so

(2) The nature of the assistance, guidance, treatment or rehabilitation.

(o) *Intake officer.* - "Intake officer" means the person assigned to the court by the Juvenile Services Administration to provide the intake services set forth in this subtitle.

(p) *Mentally handicapped child.* - "Mentally handicapped child" means a child who is or may be mentally retarded or mentally ill.

(q) *Party.* - "Party" includes a child who is the subject of a petition, the child's parent, guardian, or custodian, the petitioner and an adult who is charged under §3-831 of this subtitle.

(r) *Shelter care.* - (1) "Shelter care" means the temporary care of children in physically unrestricting facilities.

(2) "Shelter care" does not mean care in a State mental health facility.

(s) *Violation.* - "Violation" means a violation of §400, §400A, §401, §402, or §403 of Article of the Code and §§26-103 of the Education Article, for which a citation is issued.

§ 3-802. Purposes of subtitle.

(a) The purposes of this subtitle are:

(1) To provide for the care, protection and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior;

(3) To conserve and strengthen the child's family ties and to separate a child from his parents only when necessary for his welfare or in the interest of public safety;

(4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents;

(5) To provide judicial procedures for carrying out the provisions of this subtitle.

(b) This subtitle shall be liberally construed to effectuate these purposes.

§3-804. Jurisdiction of court.

(a) The court has exclusive original jurisdiction over a child alleged to be delinquent, in need of supervision, in need of assistance or who has received a citation for a violation.

(b) The court has exclusive original jurisdiction over proceedings arising under the Interstate Compact on Juveniles.

(c) The court has concurrent jurisdiction over proceedings against an adult for the violation of §3-831 of this subtitle. However, the court may waive its jurisdiction under this subsection upon its own motion or upon the motion of any party to the proceeding, if charges against the adult arising from the same incident are pending in the criminal court. Upon motion by either the State's Attorney or the adult charged under §8-831, the court shall waive its jurisdiction, and the adult shall be tried in the criminal court according to the usual criminal procedure.

§3-805. Determination of jurisdiction.

(a) *Cases of delinquency.* - If a person is alleged to be delinquent, the age of the person at the time the alleged delinquent act was committed controls the determination of jurisdiction under this subtitle.

(b) *Other cases.* - In all other cases the age of the child at the time the petition is filed controls the determination of jurisdiction under this subtitle.

§3-806. Retention or termination of jurisdiction.

(a) If the court obtains jurisdiction over a child, that jurisdiction continues until that person reaches 21 years of age unless terminated sooner.

(b) This section does not affect the jurisdiction of other courts over a person who commits an offense after he reaches the age of 18.

(c) Unless otherwise ordered by the court, the court's jurisdiction is terminated over a person who has reached 18 years of age when he is convicted of a crime, including manslaughter by automobile, unauthorized use or occupancy of a motor vehicle, or operating a vehicle while under the influence of intoxicating liquors or drugs, but excluding a conviction for a violation of any other traffic law or ordinance or any provision of the State Boat Act, or the fish and wildlife laws of the State.

§3-814. Taking child into custody.

(a) A child may be taken into custody by any of the following methods:

(1) Pursuant to an order of the court;

(2) By a law enforcement officer pursuant to the law of arrest;

(3) By a law enforcement officer or other person authorized by the court if he has reasonable grounds to believe that the child is in immediate danger from his surroundings and that his removal is necessary for his protection; or

(4) By a law enforcement officer or other person authorized by the court if he has reasonable grounds to believe that the child has run away from his parents, guardian, or legal custodian.

(b) If a law enforcement officer takes a child into custody he shall immediately notify, or cause to be notified,

the child's parents, guardian, or custodian of the action. After making every reasonable effort to give notice, the law enforcement officer shall with all reasonable speed:

(1) Release the child to his parents, guardian, or custodian or to any other person designated by the court, upon their written promise to bring the child before the court when requested by the court, and such security for the child's appearance as the court may reasonably require, unless his placement in detention or shelter care is permitted and appears required by §3-815, or

(2) Deliver the child to the court or a place of detention or shelter care designated by the court.

(c) If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.

§3-815. Detention and shelter care prior to hearing.

(a) Only the court or an intake officer may authorize detention or shelter care.

(b) If a child is taken into custody, he may be placed in detention or shelter care prior to a hearing if:

(1) Such action is required to protect the child or person and property of others;

(2) The child is likely to leave the jurisdiction of the court; or

(3) There are no parents, guardian, or custodian or other person able to provide supervision and care for the child and return him to the court when required.

(c) If the child is not released, the intake officer shall immediately file a petition to authorize continued detention or shelter care. A hearing on the petition shall be held

not later than the next court day, unless extended by the court upon good cause shown. Reasonable notice, oral or written, stating the time, place, and purpose of the hearing, shall be given to the child and, if they can be found, his parents, guardian, or custodian. Detention and shelter care shall not be ordered for a period of more than 30 days unless an adjudicatory or waiver hearing is held. However, detention time may be extended for not more than 30 days where the petition charges the child with a delinquent act and where the court finds, after a subsequent hearing, that extended detention is necessary either for the protection of the child or for the protection of the community.

(d) A child alleged to be delinquent may not be detained in a jail or other facility for the detention of adults.

(e) A child alleged to be in need of supervision or in need of assistance may not be placed in detention and may not be placed in a State mental health facility. If the child is alleged to be in need of assistance by reason of a mental handicap, the child may be placed in shelter care facilities maintained or licensed by the Department of Health and Mental Hygiene or if these facilities are not available, then in a private home or shelter care facility approved by the court. If the child is alleged to be in need of assistance for any other reason, or in need of supervision, he may be placed in shelter care facilities maintained or approved by the Social Services Administration, or the Juvenile Services Administration, or in a private home or shelter care facility approved by the court.

(f) The intake officer shall immediately give written notice of the authorization for detention or shelter care to the child's parent, guardian, or custodian, and to the court. The notice shall be accompanied by a statement of the reasons for taking the child into custody and placing him in detention or shelter care. This notice may be combined with the notice required under subsection (c).

§3-819. Adjudication.

(a) After a petition or citation has been filed, and unless jurisdiction has been waived, the court shall hold an adjudicatory hearing.

(b) (1) Before a child is adjudicated delinquent, the allegations in the petition that the child has committed a delinquent act must be proved beyond a reasonable doubt.

(2) Before a child is found to have committed the violation charged in a citation, the allegations in the citation must be proved beyond a reasonable doubt.

(c) If an adult is charged under this subtitle, the allegations must be proved beyond a reasonable doubt.

(d) In all other cases the allegations must be proved by a preponderance of the evidence.

§3-820. Disposition; costs.

(a) After an adjudicatory hearing the court shall hold a separate disposition hearing, unless the petition or citation is dismissed or unless such hearing is waived in writing by all of the parties. The disposition hearing may be held on the same day as the adjudicatory hearing, if notice of the disposition hearing, as prescribed by the Maryland Rules, is waived on the record by all of the parties.

§3-821. Right to counsel.

A party is entitled to the assistance of counsel at every stage of any proceeding under this subtitle.

Art. 27, §35A. Causing abuse to child.

(a) Definitions. - (1) In this section the following words have the meaning indicated.

(2) "Abuse" means:

(i) The sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a

malicious act by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; or

(ii) Sexual abuse of a child, whether physical injuries are sustained or not.

(3) "Child" means any individual under the age of 18 years.

(4) (i) "Sexual abuse" means any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child.

(ii) "Sexual abuse" includes, but is not limited to:

1. Incest, rape, or sexual offense in any degree;

2. Sodomy; and

3. Unnatural or perverted sexual practices.

(b) Violation constitutes felony; penalty. - A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a child who causes abuse to the child is guilty of a felony and on conviction is subject to imprisonment in the penitentiary not exceeding 15 years.

SENATE BILL NO. 27

1989 Laws of Maryland, Ch. 288
(enacting §9-123 of the
Courts and Judicial Proceedings Article)

(A) (1) In this section the following words have the meanings indicated.

(2) "Other Information" includes any book, paper, document, record, recording, or other material.

"Prosecutor" means:

(I) The State's Attorney for a County;

(II) A Deputy State's Attorney;

(III) The Attorney General of the State; or

(IV) A Deputy Attorney General or designated Assistant Attorney General.

(B) (1) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, and the court issues an order to testify or provide other information under subsection (C) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination.

(2) No testimony or other information compelled under the order, and no information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with the order.

(C) If an individual has been, or may be, called to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, the court in which the proceeding is or may be held shall issue, on the request of the prosecutor made in accordance with

subsection (D) of this section, an order requiring the individual to give testimony or provide other information which the individual has refused to give or provide on the basis of the individual's privilege against self-incrimination. The Order shall have the effect provided under Subsection (B) of this section.

(D) If a prosecutor seeks to compel an individual to testify or provide other information, the prosecutor shall request, by written motion, the court to issue an order under subsection (C) of this section when the prosecutory determines that:

(1) The testimony or other information from the individual may be necessary to the public interest; and

(2) The individual has refused or is likely to refuse to testify or provide other information on the basis of the individual's privilege against self-incrimination.

(E) If a witness refuses to comply with an order issued under subsection (C) of this section, on written motion of the prosecutor and on admission into evidence of the transcript of the refusal, if the refusal was before a grand jury, the court shall treat the refusal as a direct contempt, notwithstanding any law to the contrary, and proceed in accordance with subtitle P. of the Maryland Rules.

SECTION 2. AND BE IT FURTHER ENACTED, That Section(s) 298(d) through (g), respectively of Article 27 - Crimes and Punishments of the Annotated Code of Maryland be renumbered to be Section(s) 298(c) through (f), respectively.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1989.

PETITIONER'S

BRIEF

(13)

Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1182 and 88-6651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

JACQUELINE BOUKNIGHT, *Respondent,*

MAURICE M., *Petitioner,*

v.

JACQUELINE BOUKNIGHT, *Respondent.*

On Writ Of Certiorari
To The Court Of Appeals Of Maryland

BRIEF ON THE MERITS OF PETITIONER MAURICE M.

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QUESTIONS PRESENTED

1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

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OTHER AUTHORITIES

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CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The "self-incrimination clause" of the Fifth Amendment to the Constitution of the United States provides as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The following provisions and sections of the U.S. Constitution, the U.S. Code, the Maryland Code and the Maryland Rules are involved in this case and are set forth in the Appendix to this brief: U.S. CONST. amendments, I, IV, VI, and XIV; 42 U.S.C.A. § 671(a)(15)(B) (West 1983); Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) ("CJP") § 3-801(e); § 3-802; § 3-814(c); § 3-815(b)(1); § 3-831; § 9-108; § 9-110; § 9-111; § 12-303(3)(x) (1988 Supp.); and § 12-701(b); Md. Fam. Law Code Ann. (1984 Repl. Vol.) ("FL") § 5-203(b); § 5-706(b); and § 10-219(a); and Md. Rules 906(a); 906(b)(2); 910(b); 911(a); 915(d); 1.6.

OPINIONS BELOW

The opinions of the Court of Appeals of Maryland ("Maryland court") are reported at 314 Md. 391, 550 A.2d 1136 (1988). The judgment of the Maryland court denying a motion for rehearing is contained in petitioner Maurice M.'s Appendix C to his Petition for a Writ of Certiorari, at 45a, and has been printed in petitioner Baltimore City Department of Social Services' ("BCDSS") Appendix to its Petition for a Writ of Certiorari, at p. 14a. The orders of the Circuit Court for Baltimore City, Division for Juvenile Causes, are unreported and contained in Maurice M.'s Petition Appendix and printed in BCDSS' Petition Appendix at 81a-87a.

JURISDICTION

The decision of the Maryland court was entered on December 19, 1988. On the same date, the Maryland court denied a timely Motion for Rehearing. Chief Justice

William H. Rehnquist, sitting as Circuit Justice for the Fourth Circuit, temporarily stayed the Maryland court's judgment on December 19, 1988. After receiving responses from all parties to the application for a stay, Chief Justice Rehnquist extended the stay on December 21, pending the filing of a petition for a writ of certiorari and full consideration by this Court. *BCDSS* v. *Bouknight*, ___ U.S. ___, 109 S.Ct. 571 (1988). BCDSS and Maurice M. filed petitions on January 18 and 23, 1989, respectively, which were granted and consolidated on April 3, 1989. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(3) (West 1983) as the petitions were filed within 90 days of the Maryland court's judgment and present important questions of federal law. S.Ct. Rule 17.1(c).

STATEMENT OF THE CASE

Petitioner Maurice M. is a child at risk. By the time he was four months old, he had suffered repeated injuries and was judicially removed from the care of his mother. Reunification services ensued, and, five months later, the Baltimore juvenile court returned Maurice to his mother and ordered therapeutic services and official monitoring. Less than a month after formal custody was restored, Maurice disappeared from the reach of the child welfare workers responsible for his protection. Seven months later, when the workers notified the juvenile court of their fear for his safety, the court ordered his mother to produce Maurice immediately. The mother refused to comply, citing first her opposition to his return to foster care and, following her incarceration for contempt, her Fifth Amendment privilege against self-incrimination. The impasse has now lasted for over a year, as the mother continues to violate the order by concealing Maurice's whereabouts.

Maurice was born on October 3, 1986 to Jacqueline Bouknight, herself the product of Baltimore's foster care system. (J.A. 29). Within the next four months, Maurice was hospitalized twice with numerous serious fractures.[1] His orthopedist concluded that the early onset of these injuries, coupled with their multiplicity and extremely unusual locations, raised "very high" suspicions of child abuse and concerns of "serous or fatal injuries absent corrective treatment." (J.A. 12). During the second hospitalization, his mother was observed throwing him into a crib on one occasion and shaking him profusely on another. (J.A. 16).

On February 11, 1987, following an abuse referral from the hospital, petitioner BCDSS filed a petition in the juvenile court alleging that Maurice was a Child in Need of Assistance ("CINA")[2] requiring the juvenile court's protection due to the allegations of abuse, the mother's inadequate explanation for his injuries, and the father's recent incarceration on drug charges. (J.A. 8-9). Later that day, the juvenile court placed the infant in shelter care, an emergency foster care status.[3] Both Maurice and Ms. Bouknight were represented by separate court-

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[1] During the first hospitalization, fractures were found in his right humerus (upper arm), scapula (shoulder blade) and glenoid (shoulder socket). (J.A. 11). On January 23, 1987, Maurice was again hospitalized when his left femur (thigh) was broken, requiring a spica (full body) cast, and his upper right arm was immobilized, suggesting a spinal cord injury, nerve damage in the shoulder joint, or birth palsy. (J.A. 11-12, 15).

[2] CJP § 3-801(e) defines a CINA in part as a child who does not receive ordinary and proper care and attention and whose parents are unable or unwilling to give him proper care and attention.

[3] The juvenile court is authorized to grant shelter care whenever necessary to protect the child. CJP § 3-815(b)(1).

appointed counsel at the shelter care hearing and all subsequent proceedings.[4]

So long as Maurice remained in the Department's custody, Ms. Bouknight cooperated fully with BCDSS and its recommended service providers. She initiated and participated regularly in counseling sessions. (J.A. 29-32). By summertime, Ms. Bouknight had completed parenting classes and begun an optional course, had worked cooperatively with an in-home aide, and had participated in a specialized therapy program designed to correct abusive parent-infant relationships. (J.A. 27).

At an adjudicatory hearing on May 19, 1987, the essential allegations in the petition were sustained by the parties' stipulation of facts, but a final disposition was delayed while the mother's counsel arranged and secured a psychological evaluation of her client. (J.A. 2). When the evaluation was not available for the rescheduled hearing on July 17, the juvenile court, aware of the mother's progress with her rehabilitative services, ordered that Maurice be returned directly to his mother with the caveat that an unfavorable report could rescind the provisional order and revert shelter care to BCDSS. *Id.*

At the next hearing on August 18, the mother regained custody of Maurice by an agreement of the parties which was approved by the court in a dispositional order. (J.A.

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[4] All children involved in CINA proceedings are entitled to be represented by their own counsel. Md. Rule 906(a). The Maryland Department of Human Resources contracts with the Legal Aid Bureau, Inc. to represent children in most CINA cases. In 1988, the Legal Aid Bureau represented more than 3,000 children at hearings on new CINA petitions and appeared in approximately 3,200 CINA court reviews. Indigent parents are represented by the Maryland Office of the Public Defender. Md. Rule 906(b)(2).

2-3, 27-28). BCDSS was required to provide protective supervision of the placement and report to the court every six months. In turn, the mother was ordered to cooperate with the Department, to attend individual therapy and the specialized parenting program, to work with the parent aide, and to refrain from physically punishing Maurice. (J.A. 27-28). Neither BCDSS nor the mother's counsel produced the psychological evaluation at the hearing, but the court was informed by BCDSS that the report was negative and opposed to reunification. (J.A. 124-36).

Shortly after custody was restored, the mother ended all cooperation with BCDSS and the array of court-ordered rehabilitative services. (J.A. 79-82). All seven visits scheduled by the parent aide from September 15 through December 8 were thwarted by Ms. Bouknight, who cancelled three times, twice was not home or failed to answer the door, and twice claimed that one year old Maurice was not at home. (J.A. 79-80). The protective services worker fared no better in his two attempted home visits. (J.A. 80-81).

No contact at all occurred between Ms. Bouknight and BCDSS throughout the following winter, and no BCDSS employee has seen Maurice since September 8, 1987. (J.A. 79-81). On March 22, 1988, BCDSS learned that the mother "was wandering about in a daze," devastated by the recent shooting death of Maurice's father. (J.A. 81). The protective services worker was notified, and he soon discovered that the mother had not scheduled any therapy or medical appointments since August 1987. (J.A. 81-82). On April 8, 1988, one day after contacting the mother, BCDSS petitioned the court to review the case, claiming, in part, that the mother had frustrated its efforts to monitor the home, had refused to reveal the child's whereabouts, had not utilized therapeutic intervention as

ordered, and had been psychologically evaluated to be a serious risk to the infant's safety.[5] When the mother continued to refuse to produce the child or reveal his whereabouts, BCDSS filed a petition for contempt and asked for an order that the child be produced to the court. (J.A. 36-39).

Ms. Bouknight maintained that Maurice was healthy and appropriately placed with relatives. (J.A. 82-83, 87). One member of her extended family claimed to have seen Maurice as recently as March 23, 1988, and another reported having seen him in February. (J.A. 81, 91). Nevertheless, a search proved fruitless, as each alleged caretaker denied having the child. (J.A. 86-91). A homicide investigation was initiated on April 14 when fears for the child's welfare mounted, but no evidence of harm was discovered.

Ms. Bouknight failed to attend a hearing scheduled for April 20, although personally served with a summons and reminded several times by her attorney that both she and Maurice were due in court that day. (J.A. 4, 42). The juvenile court ordered shelter c:.e of the infant to BCDSS and ordered the mother to show cause why she should not

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[5] The evaluation was conducted on July 27, 1987 by a psychologist chosen by Ms. Bouknight's therapist and attorney. (J.A. 2, 136). The report was finally obtained by BCDSS on September 8, 1987 but was not provided to the court or counsel until April 19, 1988. (J.A. 124-36). It strongly advised against reunification, and among its most chilling findings for the potential of abuse was the following section:

> She is not now able to relate constructively to her child, since her child is seen as fulfilling her needs rather than the reverse. She becomes totally frustrated and enraged to find herself unable to gain from her child what she wishes as a replacement for what she lack[ed] in her own childhood. When her frustration mounts, she is likely to act out toward the child and see the child as abusive to her rather than herself as abusive to the child.

(J.A. 25).

be held in contempt for failing to appear and produce the baby in court. (J.A. 4).

On April 27, 1988 the mother was located, arrested, and brought to the juvenile court which continued the mother's detention overnight to allow the police to verify her assertion that Maurice had been placed with her sister in Dallas. (J.A. 61, 67). When BCDSS reported on April 28 that the Dallas police had stated that Maurice was not with his aunt, (J.A. 73), the juvenile court found the mother in civil contempt but explained that the citation could be purged by producing Maurice to the court or revealing his whereabouts. (J.A. 74). Ms. Bouknight was remanded to jail, where she remains incarcerated.[6]

The mother has never asserted as a defense to the contempt citation that she is unable to produce Maurice. Similarly, her violations of the shelter care order, the summons to appear in court, and even the April 20 bench order to produce Maurice were neither challenged in the trial court nor subsequently appealed. Instead, on April 28, her attorney noted that the opportunity to purge might not be constitutional if it would require admission to a crime. (J.A. 72). Ultimately, on May 18, the mother asserted her Fifth Amendment privilege as justification for refusing to produce the child. (J.A. 103). Legal memoranda were submitted by all parties,[7] and on May 26, the

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[6] She is also now incarcerated for a September 27, 1988 conviction of burglary. Petitioner BCDSS' Supplement to Emergency Motion for Stay of Judgment Pending Filing and Disposition of Petition for Writ of Certiorari, at 1 (December 20, 1988), U.S. Sup.Ct. No. A-494.

[7] Petitioners' counsel argued that compulsory production of the child was required as the child was not testimonial physical evidence. Maurice's counsel also argued that the court must balance the interest of children in receiving protection from abuse or neglect against

court held that since non-communicative methods were available to produce Maurice, the contempt order did not compel testimonial information in violation of the Fifth Amendment. (J.A. 157-58). The mother appealed the contempt citation that day.

On December 19, 1988 the Maryland court vacated the juvenile court's contempt citation and ordered Ms. Bouknight's release. The decision relied specifically on the mother's incarceration as creating the need for "testimony":

> To purge the contempt order and thereby free herself from imprisonment, Bouknight must impart information to someone sufficient to permit Maurice to be produced in court, or provide information of his present whereabouts. Should she do so, Bouknight will necessarily admit a measure of continuing control and dominion over Maurice's person.

In re Maurice M., 314 Md. 391, 404, 550 A.2d 1135, 1141 (1988). The court also refused to balance the possible threat of self-incrimination against the clear risks to Maurice and other children requiring judicial protection:

> While it may be argued that the Juvenile Causes Act absolutely requires that Bouknight produce Maurice in court or provide information as to his location, and thus bears some kinship to a statutory reporting requirement, we simply are unable in the [sic] circumstances to, in effect, totally expunge Bouknight's Fifth Amendment rights where the risk of prosecution is so substantial. Assuming, arguendo, that there may be causes in which a balancing test is

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the risk of their parents' possible self-incrimination, and that the mother could not collaterally attack a valid court order to produce the child. (R. 75, 77). The court dismissed the mother's Fifth Amendment claim on the basis of the petitioners' arguments. (J.A. 157).

> appropriate to determine the existence of the Fifth Amendment privilege, we conclude that the case before us is not one of them.

Id. at 409, 550 A.2d at 1143-44. Two members dissented and noted that the majority had ignored "the significant societal interest in the welfare of the child." *Id.* at 415, 550 A.2d at 1147.

Later that day, the Maryland court denied BCDSS' motion for rehearing, but Chief Justice William H. Rehnquist, sitting as Circuit Justice, temporarily stayed the Maryland court's judgment. After receiving responses from all parties, Chief Justice Rehnquist extended the stay pending the filing of a petition for certiorari and full consideration by the Court. BCDSS and Maurice filed petitions on January 18 and 23, respectively, which were granted and consolidated by the Court on April 3, 1989.

SUMMARY OF ARGUMENT

I. A. The order to bring her son Maurice to the juvenile court no more violates Ms. Bouknight's Fifth Amendment rights than it would if it required her to provide a blood sample, produce records, or sign authorizations. None of these demands, including the production of Maurice, are testimonial as the act of producing them does not assert incriminating information. *Fisher* v. *United States*, 425 U.S. 391, 408 (1976). Maurice can be produced without his mother "utter[ing] a sound", *In re Maurice M.*, 314 Md. at 404, 550 A.2d at 1141, so there is no question that his production is non-testimonial. His physical condition does not implicate the privilege, and his mother has never indicated that she cannot comply with the order. Ms. Bouknight's incarceration for contempt is not an attempt by the juvenile court to coerce her to divulge facts about Maurice. Instead, the purpose of

the valid, unappealed order to produce Maurice is to assure his protection.

B. Prior to her incarceration, she had broad options for arranging Maurice's anonymous appearance in court. Currently, Ms. Bouknight still has non-testimonial, private, and privileged means of complying with the order. Communication of his whereabouts to her attorney or other privileged confidants would not be traceable to her. *Fisher*, 425 U.S. at 403-04. Ms. Bouknight stands in the same shoes as the custodial agents in *Braswell* v. *United States*, 487 U.S. ___, 108 S.Ct. 2284 (1988), and *Doe* v. *United States*, 487 U.S. ___, 108 S.Ct. 2341 (1988). By regaining custody of Maurice, she accepted the obligation to produce him upon the court's command. The Maryland court's equation of Maurice to artifacts of crime is factually and legally unsupportable. The facts of this case do not implicate the Fifth Amendment.

II. A. Notwithstanding the mother's possible privilege, protecting children in jeopardy of serious harm is an inviolable obligation of the state under its *parens patriae* power. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). Juvenile courts, vested with *parens patriae* powers, have the authority to moderate parents' rights when necessary to shield children from harm. At a time when child abuse and neglect have surpassed epidemic proportions, the power of juvenile courts to compel a child's production must be clear and unequivocal.

B. This Court has readily resolved tensions between compelling public needs and Fifth Amendment rights by balancing the interests involved. Exceptions for required records and mandatory disclosures of information have evolved into a balancing test which assesses the neutral, noncriminal purpose of the statute, its applicability to the

general public, and its broad focus on a noncriminal class. *California* v. *Byers*, 402 U.S. 424, 430-31 (1971). Even where the state's demands are not based on a statute or regulation, Fifth Amendment rights can be outweighed by exigent public safety needs. *New York* v. *Quarles*, 467 U.S. 649, 657 (1984).

C. Maryland's Juvenile Causes Act is a neutral, noncriminal statute aimed at parents whose children require the assistance of the juvenile court. The court is a civil and therapeutic forum intended to assist families, not to punish parents. This Court has had increasing occasion to address child abuse and neglect issues, "a problem of disturbing proportions in today's society." *Coy* v. *Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 2803 (O'Connor, J. concurring). Faced with rampant child abuse, juvenile courts must have the authority to compel production. Parents' assertions of their First, Fourth, and Sixth Amendment rights are not constitutionally protected if they jeopardize the life, health or safety of children. The "State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York* v. *Ferber*, 458 U.S. 747, 756-57 (1982) (citation omitted). Even constitutional rights of criminal suspects are subject to modification if their assertion might injure specific children. *Coy* v. *Iowa*, 108 S.Ct. at 2803. No alternatives exist for Maurice's safety other than striking a balance in support of the order of production.

ARGUMENT

I. THE COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED CHILD DOES NOT COMPEL INCRIMINATING TESTIMONY PROTECTED BY THE FIFTH AMENDMENT.

It is well-settled Fifth Amendment doctrine that individuals can be compelled to produce tangible objects or

perform involuntary acts without infringing their privilege against self-incrimination. Blood samples, voice and handwriting exemplars, the modeling of clothing, corporate records, and signatures to authorization forms all can be compelled precisely because their production neither involves direct testimony nor asserts testimonial facts. The production of a child placed in his mother's custody should be compelled just as readily.

The mother's claim of privilege disregards the limited scope of the juvenile court's order. At most, the court required the appearance of Maurice through methods or means unknown; the availability of alternative methods for securing Maurice's appearance eliminates any testimonial element. Moreover, even if the mother were required to produce the child herself, she would convey scant incriminatory testimony since she is under a court order to maintain Maurice in her physical as well as legal control.

The privilege against self-incrimination does not shield individuals from compulsory disclosure of incriminating information. Instead, it only applies when the state compels testimony: "The 'historic' function of the privilege has been to protect a "'natural individual from compulsory incrimination through his own testimony or personal records.'"'" *Andresen* v. *Maryland*, 427 U.S. 463, 470-71 (1976) (citations omitted). Unlike testimony or communications, real or physical items which do not convey the thoughts of an individual are not protected. *Schmerber* v. *California*, 384 U.S. 757, 762-63 (1966).

In recent years, the Court has crystalized the "testimonial" analysis to permit disclosure of physical objects and most records unless the act of production infers incriminating facts of existence, authenticity, or control.

Fisher v. *United States*, 425 U.S. 391, 411 (1976); *United States* v. *Doe*, 465 U.S. 605, 613-14 (1984) (*"Doe I"*). Where the testimonial information conveyed by producing the item is slight, either because the individual's legal position already presumes the capacity and duty to comply, *Braswell* v. *United States*, 487 U.S. ___, 108 S.Ct. 2284, 2291 (1988), or the action conveys no information to the government, *Doe* v. *United States*, 487 U.S. ___, 108 S.Ct. 2341, 2347 (1988) (*"Doe II"*), it does not trigger the privilege. Under these clear-cut tests, Maurice's production can be compelled since his mother is already assumed to have control over her son and since she can satisfy the order without communicating a word to the government.

The Maryland court acknowledged but failed to apply these standards. It relied on inapplicable considerations, such as the mother's incarceration for contempt, to establish a compulsion to communicate even though her words could remain privileged and private. The court provided no analysis or guidance to justify its sweeping conclusion that any appearance of the child would necessarily implicate the mother's continuing control and dominion. Even the sole legal rationale provided by the Maryland court—an analogy to criminal cases in which suspects or defendants cannot be compelled to yield either illegal contraband or the instruments of a crime—rests on the unacceptable equation of a child with an artifact of crime. The Maryland court has ignored this Court's repeated admonition that non-testimonial acts are not privileged.

A. The Order To Produce Maurice Does Not Require His Mother To Divulge Information.

As the Maryland court concedes, the order requiring Maurice's production does not compel Ms. Bouknight "to utter a sound." *In re Maurice M.*, 314 Md. at 404, 550

A.2d at 1141 (1988). Thus, unless his appearance itself casts inferences of her control and knowledge, it cannot abridge the Fifth Amendment. As Justice Holmes stated, "a party is privileged from producing evidence, but not from its production," *Johnson* v. *United States*, 228 U.S. 457, 458 (1913). Maurice's production has never required the mother's direct or discoverable participation, and not even the Maryland court suggests that adverse testimonial inferences could be drawn from Maurice's simple appearance at court. The juvenile court frequently remarked that a verified discovery of Maurice by anyone, at any location, would satisfy its order. Ms. Bouknight's attorney, the child's current caretaker, or anonymous tips could all secure the child's production without risk of incrimination to Ms. Bouknight.

Because the mere physical presence of the infant would not implicate the privilege, his relative condition at the time of discovery is also not testimonial. The testimonial analysis is never affected by the level of incrimination which could result from production. Thus, even if Maurice were to have discoverable injuries potentially attributable to abuse, the severity of those injuries would have no bearing on whether his production asserts testimonial facts.

Should the mother be unable to produce him, she can always communicate that claim through her counsel's proffer to the court without incriminating herself in a subsequent criminal trial. "Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply." *United States* v. *Bryan*, 339 U.S. 323, 330 (1950). Until she affirmatively raises the issue of impossibility, however, it is premature to guess the juvenile court's possible response.

The Maryland court skirted these issues because it never addressed the fundamental question before this

Court: whether the juvenile court has plenary authority to order a parent to produce a previously victimized child despite her Fifth Amendment claim. The court relied on the mother's incarceration as somehow requiring her to communicate instructions to an individual which would "necessarily admit a measure of continuing control and dominion over Maurice's person." *In re Maurice M.*, 314 Md. at 404, 550 A.2d at 1141. While her confinement may pose burdens, it neither alters the original obligation to produce Maurice nor eliminates her non-testimonial options.

Contrary to the Maryland court's analysis, Ms. Bouknight is not incarcerated because the juvenile court sought to determine from "her own mouth" where Maurice is located or what circumstances prompted his disappearance. Rather, she remains in jail for her consistent defiance of valid bench orders for the production of Maurice. No order or summons has compelled her to communicate facts to the state—producing Maurice would suffice.

The mother cannot plead the penalties imposed for her contumacious behavior as justification for her decision to violate judicial directives. At no point has the mother challenged the constitutional validity of the orders she violated.[8] Even after her arrest, she chose to appeal the

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[8] The mother had numerous opportunities to challenge the juvenile court's authority prior to the contempt hearings of April 28, May 18 and May 26, 1988. Under Md. Rule 911(a), her counsel could have sought an immediate exception to review the master's order of shelter care. She could have also appealed pursuant to CJP § 12-303(3)(x) (1988 Supp.) and sought a stay. CJP § 12-701(b). Other remedies were also available, including a motion to quash the summons, a request to reconsider the original order of protective supervision or an appeal of the bench orders that she present Maurice to court pursuant to CJP § 3-814(c).

contempt order but not the preceding orders for production of her son. The practice of collaterally attacking orders of production at contempt proceedings is barred because it "convert[s] . . . the privilege from [a] shield against compulsory self-incrimination . . . into a sword whereby a claimant asserting the privilege would be freed from producing evidence in support of a burden which would otherwise have been his." *United States* v. *Rylander*, 460 U.S. 752, 758 (1983). Since Ms. Bouknight invited sanctions when she violated valid orders, she cannot now assert those penalties as the basis for rendering compliance unconstitutional. Her incarceration cannot furnish the grounds for a backdoor constitutional challenge of the original order.

Imprisoning Ms. Bouknight might hinder her ability to produce Maurice, but it does not transform his production into a testimonial act. Even if the contempt citation were a valid consideration at this point, it would have no effect on the testimonial analysis.

Throughout these proceedings, the court reminded the mother repeatedly that she had available any number of "silent" methods of purging her contempt without compromising her privilege. An anonymous phone call to the police; a confidential instruction to her attorney, clergy, or other privileged confidants, *see* CJP §§ 9-108, 9-110, and 9-111; or a call to the child's caretaker, could all lead to Maurice's discovery without an incriminating statement or act by the mother. At a minimum, the attorney-client privilege undoubtedly shields any statements to her attorney. *Fisher* v. *United States*, 425 U.S. at 403-05; *Md. Lawyers' Rules of Professional Conduct* Rule 1.6. Since the attorney's subsequent actions in securing Maurice's discovery could neither be discovered by the state nor, if already known, used in a criminal proceeding against the

mother,[9] her original directive would remain confidential and nonincriminatory.

The Maryland court cites no authority for its novel position that confidential communication is embraced by the privilege merely because it is compelled and may result in eventual incrimination. So long as the mother's instruction is not disclosed to the state, it is not testimony: "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe II*, 108 S.Ct. at 2347. The Maryland court confuses the initial "communication" standard of *Schmerber* with *Fisher's* subsequent admonition that a valid Fifth Amendment claim arises "only when [a person] is compelled to make a *testimonial* communication that is incriminating." 425 U.S. at 408 (emphasis in original).[10] If the compelled

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[9] On Sixth Amendment grounds alone, the attorney's role must remain confidential. The subsequent actions of the attorney would also be protected by the attorney-client privilege:

> If, however, the client gave the evidence to the attorney (or told the attorney where to find it) in the course of seeking legal advice, the attorney-client privilege will bar the prosecution from compelling the attorney to testify as to how he obtained the material. Indeed, where identification of the attorney as the person who produced the item would suggest to the jury that the attorney had received it from his client, the prosecution has been precluded from using that fact in evidence.

W. LaFave and J. Israel, 2 *Criminal Procedure* § 19.4, 124 (1988 Supp.) (footnotes deleted).

[10] *Schmerber* acknowledged the problem of distinguishing between a possible application of the Fifth Amendment to all communications or limiting the privilege to those communications with testimonial qualities, as Wigmore had advocated. 384 U.S. at 763 n.7. While *Schmerber* refrained from adopting Wigmore's stricter testimonial standard, the *Fisher* Court specifically endorsed a testimonial standard. 425 U.S. at 408. *See also Doe II*, 108 S.Ct. at 2347 n.8.

information cannot be used as testimony or relied upon by the state in subsequent prosecutions against the mother, it is not protected—the privilege protects one only "from having to share his thoughts and beliefs with the government." *Doe II*, 108 S.Ct. at 2349.[11] As *Doe II* noted, "directing the recipient of a communication to do something is not an assertion of fact or, at least in this context, a disclosure of information." 108 S.Ct. at 2351.

Ms. Bouknight remains a constitutionally free actor despite her loss of liberty. When "safe, painless, and commonplace" alternatives are provided which do not themselves infringe a privilege, no unconstitutional coercion is present. *South Dakota* v. *Neville*, 459 U.S. 553, 563 (1983). Since her options risk no greater penalty than that originally imposed by the juvenile court—temporary loss of custody of her son—they do not present "the cruel trilemma" of self-accusation, perjury, or contempt proscribed by the Fifth Amendment. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

B. The Mother Would Not Convey Testimony By Producing A Child Under Her Custody.

Even if no alternatives were available to the mother and she were required to produce Maurice directly, her

[11] Since the state would never know of, and thus could never use, the privileged statement of the mother, she is in a similar position to that of a witness offered use immunity—her words cannot be applied to incriminate herself directly or indirectly. *See Kastigar* v. *United States*, 406 U.S. 441, 453 (1972) (use immunity only ensures that the testimony will not lead to criminal sanctions against the witness). Indeed, the only distinction is that her privileged instruction may ultimately lead to the production of Maurice, but if the mother is not implicated in his discovery, his production is non-testimonial. "Th[e] prohibition of derivative use assumes that the suspect's initial privileged communication is testimonial." *Doe II*, 108 S.Ct. at 2346 n.6.

actions would not imply testimonial facts of control which could incriminate her.[12] Ms. Bouknight has been Maurice's custodian, and, as such, she would not reveal any additional facts concerning his control or dominion which are not already known by the juvenile court. Her actions would add "little or nothing to the sum total of the Government's information" and thus have only "minimal testimonial significance." *Fisher* v. *United States*, 425 U.S. at 411. The order of protective supervision specifically required Maurice's placement with his mother. (J.A. 3). If Ms. Bouknight had honored that order by producing her child upon the court's demand, she at most would have confirmed that she had maintained legal and actual custody as directed.

Formal custodial relationships can override the privilege against testimonial acts of production. Traditionally, custodial agents of "collective entities" cannot invoke the Fifth Amendment to negate an otherwise appropriate request for production. *Braswell* v. *United States*, 108 S.Ct. at 2291. In justifying the states' power to compel custodians to produce materials, four separate approaches have emerged, all directly analogous here: (a) a legally sanctioned relationship; (b) ability to comply without testifying; (c) diminished expectation of privacy; and (d) public policies supporting production.

First, parents and corporate custodians are both bound by strict legal relationships. When Ms. Bouknight accepted custody of Maurice, she assumed specific responsibilities to maintain appropriate care and supervision and thereby established a binding presumption of her

[12] The other possible testimonial assertions, identity and existence, are self-evident. *See In re Maurice M.*, 314 Md. at 414, 550 A.2d at 1146 (McAuliffe, J. dissenting).

continuing care and dominion. FL §§ 5-203(b), 10-219(a). Ms. Bouknight's actions would confirm only what the law already presumes: he is her child, placed in her control by court order. While familial relations are not collective entities, corporate records custodians do have custodial obligations analogous to parental obligations. Agents of collective entities benefit from "special privileges and franchises" conferred by the state, but they are bound by duties to permit inspection and monitoring, *Hale* v. *Henkel*, 201 U.S. 43, 74 (1906), and "to produce corporate records on proper demand by the Government." *Braswell* v. *United States*, 108 S.Ct. at 2291. The mother's burden of producing Maurice on "proper demand" is an obvious incident to the custody award. If parents are entitled to full constitutional protection of their special relationships with their children, they must honor the obligations which accompany those rights.

Second, Ms. Bouknight is not being compelled to testify. Both *Curcio* v. *United States*, 354 U.S. 113, 124-25 (1957), and *Braswell* v. *United States*, 108 S.Ct. at 2293, distinguish between orders requiring custodians to perform an essentially mechanical task—production of unprivileged objects—and those compelling a witness to testify orally. In situations where possession is presumed by law, such as the custody of a child, only oral testimony beyond the mere act of production triggers the Fifth Amendment.

Third, the mother's privacy interest was diminished when the court found Maurice to be a CINA. A similar diminution of privacy in maintaining corporate records animates, in large part, the Court's consistent refusal to extend the privilege to a collective entity. *Bellis* v. *United States*, 417 U.S. 85, 91-92 (1974); *Wilson* v. *United States*, 221 U.S. 361, 382 (1911). *Wilson* relied on "the reservation

of the visitatorial power of the State" to override the privilege, *id.*, an almost precise description of BCDSS' powers under the order of protective supervision.

Finally, long before balancing private and public concerns dominated constitutional analysis, this Court recognized that the inherent and necessary power of federal and state governments to enforce their laws could influence the Fifth Amendment's reach. *United States* v. *White*, 322 U.S. 694, 700-01 (1944). Subsequently, *Bellis* acknowledged a fear that the privilege would "largely frustrate legitimate governmental regulation of [collective] organizations" as a valid basis for restricting the privilege. 417 U.S. at 90. Policy concerns still shape the collective entity custodian analysis, as *Braswell* focused on "a detrimental impact on the Government's efforts to prosecute 'white-collar crime', one of the most serious problems confronting law enforcement." 108 S.Ct. at 2294. These concerns pale when compared to the vital priority of protecting Maurice and other children at risk. The child welfare system and the children who depend on it certainly deserve as much deference as this Court accords to economic interests in regulating corporate excess and policing white collar crime.

The Maryland court failed to apply the facts of this case to a rigorous *Fisher* analysis. "'The difficult question of whether compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case.'" *Doe II*, 108 S.Ct. at 2350, *quoting Fisher*, 425 U.S. at 410. Pertinent considerations such as Maurice's infancy, Ms. Bouknight's grant of custody, and the civil nature of CINA proceedings were ignored. Instead, the court relied exclusively on criminal cases which had barred production of either illegal contraband or the suspected instru-

mentalities of criminal acts, all deliberately sought to aid in prosecutions. In one case involving a forged alien registration card, the court explicitly limited the prohibition against production to criminal inquiries solely concerned with proving a crime:

> Since the purpose of these cards is non-criminal, the fifth amendment privilege should not prevent production in the normal immigration inquiry situation . . . . However, when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged "cards" and the defendant's card had previously been examined, the privilege should apply.

United States v. *Campos-Serrano*, 430 F.2d 173, 176 (7th Cir. 1970).

More important, these criminal cases demanded active participation of the suspect to comply with a court directive. *Commonwealth* v. *Hughes*, 380 Mass. 583, 404 N.E.2d 1239, *cert. denied*, 449 U.S. 900 (1980), and *State* v. *Alexander*, 281 N.W.2d 349 (Minn. 1979), involved judicial commands where authentication by the suspect was the primary motive for production in each case. As for possessory crimes, such as the forged card in *Campos-Serrano* and the cocaine in *State* v. *Dennis*, 16 Wash.App. 417, 558 P.2d 297 (1976), production by the defendants was critical to the request. Unlike the juvenile court's order, therefore, those directives had one primary goal: linking the objects to the suspects. Equating artifacts of a crime to a child is factually and legally unsupportable.

II. THE *PARENS PATRIAE* DUTY OF THE STATE TO PROTECT CHILDREN AT RISK OF HARM OVERRIDES THE MOTHER'S FIFTH AMENDMENT PRIVILEGE.

A. Protecting Children Is An Inviolable Obligation Of The State.

Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.

May v. *Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring). Unquestionably, Maurice requires the state's assistance to ensure his safety. Once the juvenile court ordered shelter care to BCDSS on April 20, the dire hazards to Maurice from remaining in his mother's care have stood as the dominant facts in this case. Ms. Bouknight's defiance of the orders of shelter care and for production of Maurice places squarely before this Court a direct challenge to the juvenile court's ability to assist any child it has determined to be at serious risk of harm.

The Maryland court nevertheless ignored Maurice's desperate need for protection, focusing instead only on his mother's possible risk of self-incrimination. Its ready sacrifice of Maurice to the individual autonomous right of his parent completely subordinates the *parens patriae* functions of the juvenile court. This Court has never doubted the wisdom of maintaining a special tribunal whose benevolent mission and unique powers are devoted to child protection:

> The theory of the [Juvenile Court] is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.

Kent v. *United States*, 383 U.S. 541, 554-55 (1966). The broad equitable powers now vested in juvenile courts reflect a societal consensus to moderate family autonomy

and parental rights whenever necessary to shield children from harm.[13]

A child's welfare must be safeguarded against all risks of harm. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), firmly established *parens patriae* as a vital state responsibility superseding even the constitutional rights of parents: "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Id.* at 165. The primacy of *parens patriae* is a longstanding rule applicable in all situations where family conflicts require judicial resolution: "The state, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). Maryland has readily accepted *parens patriae* as a fundamental obligation of its equity jurisdiction over children. *Wentzel* v. *Montgomery General Hospital*, 293 Md. 685, 701-02, 447 A.2d 1244, 1252-53 (1982), *cert. denied*, 459 U.S. 1147 (1983).

The Maryland court's creation of a parental privilege to disobey a judicial command to produce a child inverts this *parens patriae* matrix of values. Inasmuch as it rewards a heightened suspicion of danger to the child with a greater solicitude to the parent's Fifth Amendment rights, the Maryland court's decision unravels *parens patriae* values at a time when the incidence of child abuse and neglect has surpassed epidemic proportions.[14]

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[13] CJP § 3-802 sets the protection and treatment of children as the foremost goal of Maryland's Juvenile Causes Act and mandates that its statutory provisions are to be liberally construed.

[14] The probable crisis in the child protection system comes at a time when that system is already overwhelmed by sharp increases in the confirmed incidence of child maltreatment nationwide. Child abuse reports rose 225% from 1976 through 1987. Of the more than two million child maltreatment reports received in 1987, an estimated 686,000 children were substantiated to be abused or neglected. *See* American Association for Protecting Children, American Humane Association, *Highlights of Official Child Neglect and Abuse Reporting 1987* 4, 10 (1989) [hereinafter cited as *Highlights*]. In 1986, the most recent year studied, 25% of the child protection cases resulted in court actions. *Highlights 1986* 42 (1988). In Maryland, child maltreatment reports rose 65% from 1981 to 1985, H.R. REP. NO. 260, 100th Cong. 1st Sess. Table 1, (Comm. Print, July 31, 1987). Despite this alarming increase, national child protection resources have increased by only 2% from 1981 to 1985. *Id.* at xiii, Findings.

B. A Balance Of Interests Is Necessary To Resolve Conflicts Between Neutral Statutes And The Fifth Amendment.

For more than a half century, this Court has tempered the Fifth Amendment privilege when confronted with vital interests and needs. The recognition that the privilege cannot be wielded to escape valid social obligations has not, however, compromised the vigilant protection of claims at the heart of the privilege: compulsory testimony, cross-examination, or custodial interrogation. Instead, the Court has employed threshold tests for determining the limited circumstances in which external factors can modify the privilege, relying on the inherent jurisdiction of a court (bankrupt's records), a special relationship (collective entity records), exigent circumstances (missing loaded gun), or a neutral noncriminal statute, to justify the incorporation of policy considerations in Fifth Amendment analysis.

Fifth Amendment cases considered by this Court have not presented as urgent a claim as Maurice's, nor satisfied so many thresholds and safeguards. Exigent circumstances obviously exist—a previously injured child has

been missing for more than a year. The order was issued by a special court empowered by neutral civil statutes to compel production. Most important, not one Fifth Amendment case previously before this Court has involved as intricate a confluence of competing rights—a child requiring protection, a child welfare system responsible for his safety, and a mother at risk of incrimination. The Maryland court nonetheless refused to weigh the interest of children in protection from harm against the risk to their parents of possible self-incrimination, perhaps recognizing that, however the balance is structured, a child's need for safety will always supersede the parent's individual rights.

This Court has had increasing occasion to comment on the burgeoning spectre of child abuse in our society. If the juvenile courts cannot be protected from a direct assault on the most fundamental of their *parens patriae* powers—the authority to compel the appearance of a child and, if needed, its placement into the state's custody—abused and neglected children will forfeit their best hope for safety.

1. Noncriminal Statutes Directed At The General Public May Override The Privilege.

Individuals have long been subject to statutory requirements to divulge incriminating information. If the state's demand is rooted in statute and is applied indiscriminately to the general public, the state can deny individual Fifth Amendment rights. Maryland's Juvenile Causes Act provides the court with authority to restrict the privilege in limited circumstances. CJP § 3-814(c).

The decisions mandating disclosure have either compelled individuals to answer affirmative questions or required the maintenance and surrender of potentially

incriminatory records (the required records exception). In the former category, individuals have been subject to statutory requirements to reveal incriminating information since *United States* v. *Sullivan*, 274 U.S. 259 (1927), upheld the income tax reporting requirement. The exception that required records must be maintained to allow "enforcement of restrictions validly established" first appeared in a dictum of *Wilson* v. *United States*, 221 U.S. 361, 380 (1911), and was finally established in *Shapiro* v. *United States*, 335 U.S. 1, 33-34 (1948). Where a statute puts most citizens at risk of self-incrimination or where it imposes reporting obligations as a means of enforcing public values, the Fifth Amendment does not always protect against disclosure of incriminating information.

Both doctrines were combined when *Albertson* v. *S.A.C.B.*, 382 U.S. 70, 79 (1965), established specific criteria to distinguish between permissibly broad statutory schemes, such as the tax code, and provisions targeting illegal activity: whether the statute is "neutral" on its face and "directed at the public at large" or "a highly selective group"; "whether the group is inherently suspect of criminal activity"; and whether the subject is "an essentially noncriminal and regulatory area of inquiry" or "an inquiry in an area permeated with criminal statutes." The *Albertson* criteria have all withstood subsequent scrutiny, as a 1968 trilogy of cases[15] struck down statutes which used tax reporting requirements "to require the individual to focus attention directly on behavior which was immediately recognizable as criminal in virtually

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[15] *Marchetti* v. *United States*, 390 U.S. 39, 57 (1968) (gambling); *Grosso* v. *United States*, 390 U.S. 62, 68 (1968) (gambling); *Haynes* v. *United States*, 390 U.S. 85, 99 (1968) (illegal firearms). *See also Leary* v. *United States*, 395 U.S. 6, 18 (1969) (marijuana).

every State in the Union." *California* v. *Byers*, 402 U.S. 424, 453 (1971) (Harlan, J. concurring).

This Court has acknowledged that its balancing of exigent public needs against individual liberties is the actual mechanism underlying *Albertson*. In *California* v. *Byers*, the Court upheld a law requiring drivers in auto accidents to reveal their names and addresses:

> Tensions between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id. at 427 (Burger, C.J. plurality). The plurality strictly applied *Albertson*, noting that the reporting provision in question was directed at activities without illegal or criminal connotations, had a noncriminal statutory purpose, and was absolutely necessary to fulfill the law's objectives. Ultimately, the Court upheld the statute by balancing these interests against the minimal risk of self-incrimination to all drivers, ignoring Byers' well-founded fears. *Id.* at 430-31. Justice Harlan concurred in the appropriateness of balancing but framed his test in less expansive terms: "the noncriminal governmental purpose in securing the information, the necessity for self-reporting . . . and the nature of the disclosures involved." *Id.* at 458.

2. Balancing Is Also Required By Nonstatutory Disclosure Requirements.

The Byers/Albertson balancing test confirms that compelling public interests can override assertions of the Fifth Amendment privilege. Statutory mandates requiring production are neither the sole nor the first instance of Fifth Amendment balancing. The "collective entities" doctrine has maintained a public policy justification for the production of corporate records since *Hale* v. *Henkel* was decided in 1906; this focus culminated last year when *Braswell* highlighted the importance of white-collar crime prevention.

Only a balancing of civil and criminal interests can explain the results in *McCarthy* v. *Arndstein*, 266 U.S. 34 (1923), which held the privilege applicable to civil proceedings yet also allowed for the compulsory surrender of personally incriminating records. The public interest was not mentioned, as the Court focused instead on the inherent jurisdiction of the civil court:

> The law requires a bankrupt to surrender his property. The books and papers of a business are a part of the bankrupt estate. To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property.

Id. at 41 (citations omitted). Likewise, juvenile courts must retain the inherent right to compel production of any child within the court's jurisdiction regardless of whether his/her production is incriminating. The privilege may be broadly applicable in civil proceedings, but its assertion cannot impede powers which are integral to the court's particular jurisdiction.

Finally, when exigent hazards endanger the public safety, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *New York* v.

Quarles, 467 U.S. 649, 657 (1984). The Court's recognition that critical Fifth Amendment safeguards provided by Miranda warnings must yield if their exercise could endanger lives revealed the practical limitations which are always placed on the privilege. As Justice Harlan noted in *Byers*, "it is the task of this Court continually to seek that line of accommodation which will render this provision relevant to contemporary conditions. In other words, we must deal in degrees in this troublesome area." 402 U.S. at 454.

C. The Compelling Interest In Protecting Children Outweighs The Privilege.

1. The Vital Need For Maurice's Production Satisfies *Byers* And Other Fifth Amendment Balancing Tests.

a. CJP § 3-814(c) Is A Neutral, Noncriminal Statute Directed At A Non-Suspect Class.

Maryland's Juvenile Causes Act, CJP § 3-814(c) in particular, bears little resemblance to the unconstitutional statutes in *Albertson* and *Marchetti*, since a requirement that parents bring their children to the juvenile court in no way "focus[es] almost exclusively on conduct which [is] criminal." *California* v. *Byers*, 402 U.S. at 454 (Harlan, J. concurring). The sole purpose of CJP § 3-814(c) is to secure the appearance of children who either require the court's protection or who need to be examined by protective service workers. Most of these children have not been the victims of crimes; many are runaways, truants, delinquents, neglected children, or disabled children requiring special services. Even among those who may have been abused, the injuries will often have been inflicted by a third party. At most, the obligation to present their children to the court targets only those parents who defy the judicial process, not those who engage in criminal acts.

Equally as important, the Juvenile Causes Act is a civil statute, therapeutic in purpose and effect, whose principal objective is "to provide for the care, protection and wholesome mental and physical development of children . . . and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest." CJP § 3-802(a)(1). The Maryland court has emphasized the civil nature of juvenile cases:

> The General Assembly has classified juvenile proceedings as civil and not criminal in nature. Moreover, the legislative intention underlying a CINA proceeding is not to punish the parent; rather, the purpose is to protect the child and provide for his best interests. Additionally it cannot be said that the potential CINA "sanctions" are "so punitive . . . in . . . effect as to negate that intention."

In re John P., 311 Md. 700, 709, 537 A.2d 263, 268 (1988) (citations omitted). *See also In re Neil C.*, 308 Md. 591, 597, 521 A.2d 329, 332 (1987). CINA adjudications thus apply functional definitions for family problems, not pejorative labels such as "abuse" or "neglect." *See* CJP § 3-801(e). Ms. Bouknight benefited substantially from the remedial purposes of the juvenile court. Finally, while the Act does have some potential for criminal sanctions, *see* CJP § 3-831, this rarely exercised penalty[16] does not by itself criminalize the statute or transform its objectives

[16] On May 26, 1989, James L. Benton, administrator of the Baltimore City juvenile court, reported to counsel for Maurice M. that since 1976 no more than five cases a year have been filed in the juvenile court which claim, pursuant to CJP § 3-831, that an adult's conduct contributed to a child's delinquency or need of supervision or assistance.

from the protection of children to the punishment of parents. *See In re John P.*, 311 Md. at 706, 537 A.2d at 267.

b. CSPS § 3-814(c) Serves A Vital Public Role.

Three cases recently decided by this Court reflect the unfortunate truism that "[c]hild abuse is a problem of disturbing proportions in today's society." *Coy* v. *Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 2803 (1988) (O'Connor, J. concurring); *Deshaney* v. *Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1007, 1012-13 (1989); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). As the incidence of confirmed reports of child maltreatment rises, *see* note 14, pp. 24-25 *supra; Coy* v. *Iowa*, 108 S.Ct. at 2808 (Blackmun, J. dissenting), the juvenile courts are confronting an ever increasing volume of cases.[17] Steady rises in the incidence of poverty among children, single-parent households, and substance abuse will only intensify the socioeconomic pressures which spawn abuse and neglect. Children's Defense Fund, *A Vision for America's Children* 46-53 (1989) (*"CDF"*).[18]

Against this depressing backdrop, courts must have an effective mechanism to compel compliance with their orders. In most protective services cases, judicial intervention is the option of last resort, sought only when persuasion is needed to induce compliance, preventive efforts have failed, or a serious emergency exists. *See*

[17] This Court has commented previously on the limited resources available to juvenile courts to intervene effectively in family problems. *Breed* v. *Jones*, 421 U.S. 519, 537 (1975).

[18] Current studies by the Children's Defense Fund project by the year 2000 an increase of 3 million children living in poverty, 2.8 million households headed by females, and 500,000 children placed in some type of foster care setting. *CDF* at 46. The last projection would roughly double the current foster care population.

Brief of Amicus Commonwealth of Massachusetts at 15, 18-24. Even then, juvenile courts have few powers available to combat a parent's recalcitrance except orders to compel production and, ultimately, contempt.[19] If protective service workers have been denied access to the child, production of the child to the court may well provide the only mechanism for determining whether maltreatment has occurred and its extent.[20] Further, for children older than Maurice, appearance at court is crucial to confer with counsel and participate actively in hearings.[21] Thus, every state but Maine has a statutory provision analogous to CJP § 3-814(c) requiring parents to produce their children to court when requested. *See* Table of Juvenile Court Production Statutes, *infra*, at 1a-2a.

c. The Mother's Limited Risk Of Incrimination Does Not Justify Her Fifth Amendment Claim.

Most parents subject to CJP § 3-814(c) bear little or no fear of incriminating themselves since production of a

[19] A recent survey by the National Council of Juvenile and Family Court Judges ("NCJFCJ") revealed that 58% of all such judges used contempt as their primary method of enforcing orders against parents. NCJFCJ, *Judicial Authority and Responsibility: 18 Recommendations on Issues in Delinquency and Abuse/Neglect Dispositions* 17-18 (1989). *See also* Brief of Amicus Charles M. at 20-21, 46-47.

[20] Protective service workers must, under Maryland law, see the child and make a determination of safety within 24 hours of receipt of an abuse report and within five days of a neglect report. FL § 5-706(b) (1988 Supp.).

[21] Md. Rule 910(b), for instance, only allows a child to be excluded from court hearings temporarily if the court finds it in his or her best interest or welfare. Under Md. Rule 915(d), all children committed to BCDSS must attend periodic hearings to review their status unless the court finds that attendance would cause serious harm. *See* American Bar Association, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties* 3.1(b)(ii)[6], at 17 (1980).

child pursuant to a lawful order "is an essentially neutral act." *Byers*, 402 U.S. at 432 (Burger, C.J. plurality). For infants in particular, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania* v. *Ritchie*, 480 U.S. at 60. Despite Maurice's previous injuries, his mother was not charged with criminal child abuse.

Under *Byers*, this minimal degree of incrimination does not override public policies. The suspect there had a "very real" fear of prosecution, but in the absence of a general risk to the target population, the plurality found it "insufficient to defeat the strong policies in favor of a disclosure." *Byers*, 402 U.S. at 428. While Justice Harlan believed that the individual risk should factor into the balance, he concluded that Byers' significant fear of incrimination did not trigger the privilege because "the state must still bear the burden of making the main evidentiary case here against the [suspect]." *Id.* at 457.[22] Since a prosecution against the mother would require independent evidence to establish that her custody of Maurice "was proximately related" to his injuries, *id.*, it is not a substantial risk which implicates the privilege.

d. The Fifth Amendment Balance Must Be Struck For The State's Duty To Protect Maurice's Safety.

The Maryland court's indifference to Maurice's plight cannot be countenanced. By failing to balance his and the

[22] The focus on the prosecutor's remaining burden as a method of determining the suspect's exposure was used by this Court in *Doe II*, when it noted that the action of the suspect did not reveal information to the government. "The Government must locate that evidence 'by the independent labor of its officers . . .'" *Doe II*, 108 S.Ct. at 2350 (citation omitted).

state's compelling interest in his protection, the Maryland court abandoned its *parens patriae* obligation to marshal every available power to ensure his safety. Public needs can temper extravagant Fifth Amendment claims, especially when vital interests irreconcilably conflict.

The tragic facts of the instant case apply to virtually every doctrine this Court has established to weigh competing Fifth Amendment interests. Like *Byers*, this case involves a neutral civil statute and a class of individuals (parents) not inherently suspected of criminal acts. Urgent action is needed to address exigent circumstances as both *Quarles* and *Shapiro* allow. Consistent with *Braswell* and *Bellis*, Ms. Bouknight's relationship with her son is, while under juvenile court jurisdiction, a special legally protected status which entitles the state to monitor and intervene. Child welfare is as quintessential a state responsibility as fighting white-collar crime was in *Braswell*. Most important, the jurisdiction of the juvenile court is challenged here by the Fifth Amendment claim just as the bankruptcy court's civil authority was in *McCarthy* v. *Arndstein*. Under these standards, denial of the juvenile court's power to compel Maurice's production is unacceptable.

2. Rights Which Jeopardize The Life Or Health Of Children Are Not Constitutionally Protected.

The assertion of an otherwise valid constitutional right can never justify dereliction of a child's care. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children . . . ." *Prince* v. *Massachusetts*, 321 U.S. at 170. When conflicts have arisen between the state's compelling interest in the protection of children and the individual liberties of their parents or other

adults, this Court has consistently held that the Constitution does not immunize acts which endanger children. Instead, a balance of interests measures the degree of risk to individual children. The Court's holding in *Prince*, while limited to First Amendment issues, has been extended to every other constitutional context in which individual rights clash with a child's life, health or welfare. Balancing remains the only appropriate vehicle for resolving fundamental but irreconcilable claims under the Constitution.

In those constitutional arenas where fundamental rights of adults have challenged the interests of children, the life and welfare of the child emerge consistently as dominant considerations. The First Amendment cases best reflect the use and outcome of balancing: "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes to some extent, matters of conscience and religious conviction." *Id.* at 167. Since *Prince*, most of the tensions between parents claiming religious freedom and the state's *parens patriae* authority have involved the parents refusing critical medical treatment for children. Citing *Prince* as dispositive authority, this Court authorized juvenile courts to allow blood transfusions to children despite the spiritual objection of their parents. *Jehovah's Witnesses* v. *King County Hospital*, 390 U.S. 598 (1968), *aff'g per curiam*, 278 F.Supp. 488 (W.D.Wash. 1967).[23] Faith-healing cases have all emphasized that the

[23] Courts have relied on *Prince* in numerous "faith-healing" cases to find that the state's inherent interest in the life and health of children of tender years is sufficiently compelling to outweigh the infringement of religious freedoms. *See, e.g., Walker* v. *Superior Court (People)*, 47 Cal.3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988), *cert. filed*, 57 U.S.L.W. 3622 (U.S. March 6, 1989) (No. 88-1471); *People in*

lawful exercise of *parens patriae* powers over religious freedoms must be predicated on both a compelling state interest as well as an absence of less restrictive or intrusive methods of protecting children.

When children face vague or minor threats to their health and welfare, state authority can be curtailed by valid First Amendment claims.[24] *Parens patriae* thus requires either an individualized finding of real or potential harm or an obvious risk of injury to all children. Hence, even though child pornography and indecent language may be protected under the First Amendment, the inherent danger to the physical and psychological health of children allows the government to ban or regulate their dissemination. *New York* v. *Ferber*, 458 U.S. 747, 756-57 (1982); *Federal Communications Commission* v. *Pacifica Foundation*, 438 U.S. 726, 750-51 (1978); *Ginsberg* v. *New York*, 390 U.S. 629, 638-40 (1968).

Balancing has also restricted the Fourth Amendment rights of parents. In upholding the right of a welfare caseworker to require home visits as a condition for benefits, this Court found the intrusion permissible under the Fourth Amendment by focusing on child protection:

Interest of D.L.E., 645 P.2d 271 (Colo. 1982); *Bergmann* v. *State*, 486 N.E.2d 653 (Ind.App. 1985); *In re Willmann*, 24 Ohio App. 3d 191, 493 N.E.2d 1380 (1986); *Commonwealth* v. *Barnhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985), *app. denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 55 (1988).

[24] In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), for instance, this Court explicitly denied an effort to enforce state compulsory education statutes because, unlike *Prince*, the case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare [had] been demonstrated or may [have] been properly inferred." *Id.* at 230.

> The public's interest . . . is protection and aid for the dependent child . . . . There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.

Wyman v. *James*, 400 U.S. 309, 318 (1971). Prominent among the other legal justifications for the intrusion were factors comparable to the instant case: an absence of practical alternatives, a sharp distinction between social workers and the police, the civil, nonprosecutorial nature of the home visit, and a concern for the "sad and unhappy" conditions in which the mother cared for her "infant Maurice". *Id.* at 322-23 and n.9.[25]

Even constitutional rights accorded to criminal suspects are subject to modifications if their assertion can be established as injurious to specific children. The Sixth Amendment right to confrontation, for instance, does not require child abuse victims to testify openly before an alleged assailant if "individualized findings" are made that the child "need[s] special protection." *Coy* v. *Iowa*, 108 S.Ct. at 2803. "[I]f a court makes a case-specific finding of

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[25] In other Fourth Amendment contexts, this Court has determined that compelling state interests in avoiding "disastrous consequences" warrant limitations of individual rights. *Skinner* v. *Railway Labor Executives Ass'n*, ____ U.S. ____, 109 S.Ct. 1402, 1408 (1989). There too, the issues underlying the balance—diminished expectation of privacy and participation in a "pervasively" regulated activity, *id.* at 1418, an absence of practical alternatives, *id.* at 1416, and life-threatening risks, *id.* at 1419—are directly applicable. However the balance is structured, the Fourth Amendment analysis holds that averting grievous injury or loss of life supersedes all other interests, regardless of whether it is the state or an individual whose action endangers others. *Tennessee* v. *Garner*, 471 U.S. 1, 11-12 (1985).

necessity . . . the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* at 2805 (O'Connor, J. concurring) (citations omitted). Similarly, since a criminal defendant's request to examine confidential child abuse reports has a "seriously adverse effect on efforts . . . to uncover and treat abuse," the Confrontation Clause requires a judge to conduct an *in camera* inspection to determine the defendant's need for the information. *Pennsylvania* v. *Ritchie*, 480 U.S. at 60. *Ritchie* found a "compelling interest" in confidentiality by focusing on the chilling effect on children who might be too frightened to report abuse if disclosure were allowed. *Id.* As evidence of that impact, the establishment of comparable rules in all fifty states helped persuade the Court of the "importance" of the public interest at stake. *Id.* at n. 17.

Maurice's need for protection stands independent of either the state's or his mother's interest in this case. "In our society, parental rights are limited by the legitimate rights and interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 630 (1979) (Brennan, J. concurring). By refusing to bring Maurice to court, his mother effectively denied him a fundamental right of access to judicial relief guaranteed by the Juvenile Causes Act and procedural due process under the Fourteenth Amendment. *See Boddie* v. *Connecticut*, 401 U.S. 371, 374-77 (1971) (denial of access to only forum for judicial relief violates due process); *cf. In re Gault*, 387 U.S. 1 (1967). Indeed, her interference with Maurice's placement in shelter care has deprived him of his fundamental right to appropriate care and custody. Since the Maryland court has immunized Ms. Bouknight's abrogation of Maurice's rights, requisite state action is present. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18 (1948). Maurice thus has crucial rights under the

Fourteenth Amendment which, by analogy,[26] can override his mother's privilege.

3. The Balance Must Be Struck For Maurice's Production.

Maurice must receive the same degree of protection against serious risk of harm posed by his mother's Fifth Amendment claim as this Court has accorded to children under First, Fourth, Sixth, and Fourteenth Amendment doctrines. The Fifth Amendment should not confer a greater immunity to parents than provided elsewhere in the Constitution, especially given the issues raised here. First, the state has a paramount stake in assuring Maurice's safety. "It is evident beyond the need for elaboration that a State's interest in 'safe-guarding the physical and psychological well-being of a minor' is 'compelling.'" *New York* v. *Ferber*, 458 U.S. at 756-57 (citation omitted). Since the mother's claim would effectively nullify significant portions of Maryland's Juvenile Causes Act and comparable provisions in other states, the state has a strong interest in vindicating its *parens patriae* power. As for the mother, her Fifth Amendment claim is far too tenuous. The order of production was preceded by an uncontested judicial finding of risk to Maurice. Its terms do not require her to testify or face interrogation, the two historical grounds for invoking the privilege. Indeed, the mother's exercise of the privilege must be weighed carefully against her record of recalcitrance, manipulation and defiance. Maurice's interests are self-evident; his life, health and nurturance cannot be assured without state intervention.

[26] Children's privacy rights under the due process clause can outweigh both their parents' right to control their access to reproductive or contraceptive services and the state's interest in regulating that access. *Carey* v. *Population Services International*, 431 U.S. 678, 694 (plurality op.) (1977); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74-75 (1976).

The Maryland court's decision holds devastating consequences for Maurice, but its consequences for other children requiring judicial protection are just as disastrous. Although the decision purports to limit its impact to those cases where the prospect of incrimination is high, all parents suspected of abuse would enjoy a privilege to harbor their children without interference. Indeed, even though the risks to the child's welfare mount in at least direct proportion to the severity of the suspected abuse, the Maryland court's calculus affords children the least protection when the dangers are greatest.

In practical terms, the decision will obstruct numerous aspects of child welfare practice. Whenever the state suspects a child to have been abused or neglected, social work intervention with parents might be forbidden unless accompanied by Miranda warnings bound to frustrate a therapeutic relationship. Even in parental kidnapping cases, the privilege would eliminate all impetus for relinquishing an abducted child. Most important, juvenile courts will be deterred from reuniting children with their families if they lack the power to compel compliance with orders of protective supervision. *See* CJP § 3-802(a)(3), 42 U.S.C.A. § 671(a)(15)(b) (West 1983). The child welfare system of every state would be frozen in a constitutional gridlock, abandoning children to otherwise preventable abuse or neglect and prolonged placements in foster care.[27]

[27] Within the past two decades, numerous legislative initiatives have focused on the scourge of child abuse and neglect: The federal Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5101 *et. seq.* (West 1983 and Supp. 1989), successfully used federal grants as

Maurice and BCDSS have no other alternatives except an order of production. The juvenile court has no authority to confer constructive use immunity on Ms. Bouknight, *Doe I*, 465 U.S. at 616-17; *Pillsbury* v. *Conboy*, 459 U.S. 248, 261 (1983), nor can it compel production by deferring judgment on the Fifth Amendment claim to a criminal suppression hearing. *Pillsbury* v. *Conboy*, 459 U.S. at 262. This Court therefore must choose between Maurice's safety and his mother's privilege, a decision which must be grounded in the fundamental values and priorities of our society. Maurice is now two and a half years old. The most recent medical information available is almost two years old. For over a year, he has been concealed and made inaccessible to those responsible for determining his safety. A societal consensus therefore requires this Court to uphold Maurice's right to safety and health, if not provided by his mother, then by the state.

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incentives for states to establish strict reporting laws. Similarly, the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. §§ 620-627, 670-676 (West 1983), overhauled federal funding for child welfare programs to promote preventive services to remedy abuse and neglect prior to judicial intervention. The inability of states to enforce these federal mandates might raise concern for their eligibility for continued federal funds. *See* Brief of Amicus U.S. Conference of Mayors, at 10 n.6.

CONCLUSION

For the foregoing reasons, the Court of Appeals of Maryland erred as a matter of law, and its decision must be reversed.

Respectfully submitted,

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APPENDIX

TABLE OF JUVENILE COURTS CHILD PRODUCTION STATUTES

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Cal. Welf. & Inst. Code §§ 364, 338 (West 1984)
Colo. Rev. Stat. § 19-2-102 (1986)
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Del. Code Ann. tit. 10, § 935 (1974)
D.C. Code Ann. § 16-2306 (1981)
Fla. Stat. § 39.437 (1988)
Ga. Code Ann. § 15-11-19 (1985)
Hawaii Rev. Stat. § 571-31 (1976 & Supp. 1984)
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La. Code Juv. Pro. Ann. art. 13 §§ 1590, 1710 (West 1983)
Maine: No Relevant Statute
Md. Cts. & Jud. Proc. Code Ann. § 3-814 (1984 & Supp. 1988)
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Mich. Comp. Laws § 712A.12 (1968 & Supp. 1988)
Minn. Stat. § 260.171 (1982 & Cum. Supp. 1989)
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Utah Code Ann. §§ 78-38-26, 28 (1987)
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Wash. Rev. Code § 13.34.070 (1989)
W. Va. Code § 49-5-7 (1986)
Wis. Stat. §§ 48.27, 28 (1982) & Supp. 1988)
Wyo. Stat. §§ 14-6-214, 6-215 (1986)

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE ANNOTATED

Title 42

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

* * *

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

* * *

(b) Failure of State to comply with plan provisions

The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section. However, in any case in which the Secretary finds, after reasonable notice and opportunity for a hearing, that a State plan which has been approved by the Secretary no longer complies with the provisions of subsection (a) of this section, or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part, or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State, or shall reduce such payments by the amount specified in his notification to the State.

ANNOTATED CODE OF MARYLAND

COURTS AND JUDICIAL PROCEEDINGS

§ 3-801. Definitions.

* * *

(e) *Child in need of assistance.*—"Child in need of assistance" is a child who requires the assistance of the court because

(1) He is mentally handicapped or is not receiving ordinary and proper care and attention, and

(2) His parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems provided, however, a child shall not be deemed to be in need of assistance for the sole reason he is being furnished nonmedical remedial care and treatment recognized by State law.

§ 3-802. Purposes of subtitle.

(a) The purposes of this subtitle are:

(1) To provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior;

(3) To conserve and strengthen the child's family ties and to separate a child from his parents only when necessary for his welfare or in the interest of public safety;

(4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents;

(5) To provide judicial procedures for carrying out the provisions of this subtitle.

(b) This subtitle shall be liberally construed to effectuate these purposes. (An. Code 1957, art. 26, § 70; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 691, § 8; 1975, ch. 554, §§ 1, 3.)

§ 3-814. Taking child into custody.

* * *

(c) If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt. (An. Code 1957, art. 26, §§ 70-9, 70-10; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 691, § 8; 1975, ch. 554, §§ 1, 3.)

§ 3-815. Detention and shelter care prior to hearing.

* * *

(b) If a child is taken into custody, he may be placed in detention or shelter care prior to a hearing if:

(1) Such action is required to protect the child or person and property of others;

§ 3-831. Contributing to certain conditions of child.

(a) It is unlawful for an adult wilfully to contribute to, encourage, cause or tend to cause any act, omission, or condition which results in a violation, renders a child delinquent, in need of supervision, or in need of assistance.

(b) A person may be convicted under this section even if the child has not been found to have committed a violation, adjudicated delinquent, in need of supervision, or in need of assistance. However, the court may expunge a delinquent adjudication from the child's record and enter it as a finding in the adult's case.

(c) An adult convicted under this section is subject to a fine of not more than $2,500 or imprisonment for not more than 3 years, or both. The court may suspend sentence and place the adult on probation subject to the terms and conditions it deems to be in the best interests of the child and the public. (An. Code 1957, art. 26, §§ 70-24, 91, 93,

99; 1973, 1st Sp. Sess., ch. 2, § 1; 1975, ch. 554, §§ 1, 3; 1977, ch. 846; 1982, chs. 111, 844.)

§ 9-108. Attorney-client privilege.

A person may not be compelled to testify in violation of the attorney-client privilege. (1973, 1st Sp. Sess., ch. 2, § 1.)

§ 9-110. Accountants.

(a) *Privilege.*—A certified public accountant, public accountant, or any person employed by him may not disclose the contents of any communication made to him by a person employing him to examine, audit, or report on any book, record, account, or statement nor may he disclose any information derived from the person or material in rendering professional service unless the person employing him or his personal representative or his successor in interest permits it expressly.

(b) *Exception.*—This privilege does not affect the criminal laws of the State or the bankruptcy laws. (An. Code 1957, art. 75A, § 21; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 691, § 8.)

§ 9-111. Minister, clergyman, or priest.

A minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation. (An. Code 1957, art. 35, § 13; 1973, 1st Sp. Sess., ch. 2, § 1.)

§ 12-303. Appeals from certain interlocutory orders.

(a) A party may appeal from:

* * *

(3) An order:

* * *

(x) Depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order. (An. Code 1957, art. 5, §§ 1A, 3, 7,

8A, 20A, art. 7, § 18; 1973, 1st Sp. Sess., ch. 2, § 1; 1975, ch. 349; 1984, ch. 255.)

§ 12-701. Stays.

* * *

(b) *Court sitting as a juvenile court.*—An appeal from the judgment of a juvenile court, including the District Court, in the exercise of its juvenile jurisdiction in Montgomery County, and with respect to a child, does not stay the final judgment appealed from, nor does it discharge the child from custody of a person, institution, or agency to whose care the child was committed by the court. The appellate court may authorize a stay, on application and hearing, if it finds that suitable provision is made for the care and custody of the child. (An. Code 1957, art. 5, §§ 11, 24, art. 26, §§ 70-25, 87; 1973, 1st Sp. Sess., ch. 2, § 1.)

FAMILY LAW

§ 5-203. Natural guardianship; powers and duties of parents; award of custody to parent.

* * *

(b) *Powers and duties of parents.*—The parents of a minor child:

(1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and

(2) have the same powers and duties in relation to the child.

§ 5-706. Investigation.

* * *

(b) *Time for initiation; actions to be taken.*—Within 24 hours after receiving a report of suspected abuse and within 5 days after receiving a report of suspected neglect, the local department or the appropriate law enforcement agency shall:

(1) see the child;

(2) attempt to have an on-site interview with the child's caretaker;

(3) decide on the safety of the child, wherever the child is, and of other children in the household; and

(4) decide on the safety of other children in the care or custody of the alleged abuser.

§ 10-219. Prohibited acts; penalities.

(a) *Duty to care for and provide for child.*—An individual who has care, custody, or control of a minor child may not desert the child:

(1) with the intent that the child become a public charge; or

(2) without providing for the child's support for at least 3 years by a responsible individual or a licensed child care facility.

MARYLAND RULES

Rule 906. Right to Counsel.

a. In All Proceedings—Appearance of Out-of-State Attorney.

The respondent is entitled to be represented in all proceedings under this Chapter by counsel retained by him, his parent, or appointed pursuant to the provisions of subsection b 2 and 3 of this Rule. An out-of-state attorney may enter his appearance and participate in a cause only after having been admitted in accordance with Rule 20 of the Rules Governing Admission to the Bar of Maryland (Special Admission for Out-of-State Attorneys). Once so admitted, his appearance and participation is limited by the restrictions of that Rule.

* * *

b. Waiver of Representation—Indigent Cases—Non-Indigent Cases.

* * *

2. Representation of Indigents.

(a) Unless knowingly and intelligently waived, and unless counsel is otherwise provided, an indigent party, or an indigent child whose parents are either indigent or unwilling to employ counsel, shall be entitled to be represented by the Office of the Public Defender at any stage in a waiver, adjudicatory or disposition hearing, or hearing under Rule 916 (Modification or Vacation of Order).

(b) Upon request or upon the court's own motion, the Office of the Public Defender shall appoint separate counsel to represent any indigent party other than the child if the interests of the child and those of the party appear to conflict, and if such counsel is necessary to meet the requirements of a fair hearing.

Rule 910. Hearings—Generally.

* * *

b. Place of Hearing.

A hearing may be conducted in open court, in chambers, or elsewhere where appropriate facilities are available. The hearing may be adjourned from time to time and may be conducted out of the presence of all persons except those whose presence is necessary or desirable. If the court finds that it is in the best interest and welfare of the child, his presence may be temporarily excluded except when he is alleged to have committed a delinquent act.

Rule 911. Masters.

a. *Authority.*

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the

court.

Rule 915. Disposition Hearing.

* * *

d. *Commitment to Department of Social Services.*

In cases in which a child is committed to a local department of social services for placement outside the child's home, the court, within 18 months after the original placement and periodically thereafter at intervals not greater than 18 months, shall conduct a review hearing to determine whether and under what circumstances the child's commitment to the local department of social services should continue. Considerations pertinent to the determination include whether the child should (1) be returned home, (2) be continued in foster care for a specified period, (3) be placed for adoption, or (4) because of the child's special needs or circumstances, be continued in foster care on a permanent or long-term basis. The hearing shall be conducted as prescribed in Rule 910 or, if conducted by a master, as prescribed in Rule 911, except that the child's presence shall not be required if presence at the hearing is likely to cause serious physical, mental, or emotional harm to the child. (Amended Nov. 5, 1976, effective Jan. 1, 1977; Apr. 18, 1980, effective July 1, 1980; June 23, 1983, effective July 1, 1983).

APPENDIX: RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

(4) to comply with these Rules, a court order or other law.

RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parents' Fifth Amendment privilege against self-incrimination?

II. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

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STATEMENT OF THE CASE

Respondent accepts the facts as stated by Petitioners except as modified, explained or supplemented. These facts are intended to put the case in proper context by demonstrating the ample support for the concession made by the Department of Social Services that Respondent has a reasonable fear of incrimination. (Pt. (DSS) B. at 12 n.13).

Subsequent to a finding that Respondent's child, Maurice, was in need of assistance, the Baltimore City Department of Social Services agreed that Maurice should remain in Respondent's custody subject to supervision by the Department. This order was agreed to on August 18, 1987. Petitioner's supervision following this order was summarized by the Court of Appeals:

> There was evidence that DSS representatives had not seen Maurice since September 4, 1987; that the DSS aide's efforts to see Maurice were thwarted by Jacqueline's statements that the child was not at home; and that Jacqueline had told police that Maurice was in the care of an aunt, but that the aunt had denied seeing Maurice. (App. Pet. Cert. 19a n.2).

According to the summary of progress prepared by the Department, Petitioner (DSS) took increased interest in the case in March, 1988. (J.A. 81-82). As a result, by April 15, 1988, the following entry appears:

> T/C [telephone call] from Officer Klein at 4 p.m.: Officer Klein to refer case to homicide to Sgt. Landsmann. (396 272 Ms. Louise Perry had never seen the baby. Case looks kinky. Officer thinks Ms. Bouknight did something that has hurt Maurice. (J.A. 88).

Similarly, on April 18, 1988, it was noted:

> T/C to Det. James Jones; nothing new on case. Worker suggested photograph of mother and to

accompany Det. Jones. Det. Jones stated he would rely on cooperation of Ms. Bouknight. Worker emphasized the possibility of this being a murder case. (J.A. 90).

Entries for April 21 and 22, 1988, leave no doubt that a "*homicide*" is being investigated.

> T/C to Det. James Jones; Det. Jones advised that case should be regarded as a homicide and that no responsible employee of city or hospital had seen the child. (J.A. 93).
>
> * * *
>
> T/C to court clerk for Judge Angeletti; Eric McDonald worker quoted Det. James Jones, "that mother is going to have to help us." Worker suggested someone from Judge Angeletti's court to impress upon police the severity of the case, that Ms. Bouknight, according to Mr. Brown, did not stay in 1726 N. Washington Street on the night of 4/21/88. (J.A. 93).

The point was reiterated on April 26, 1988:

> T/C with Dot Rosinski, Chief of PS; Dot Rosinski to contact Youth Division of BCP on morning of 4/27/88, to request that greatest attention be given to the matter *as it is a possible homicide*. (emphasis added) (J.A. 95).

Again on May 4, 1988:

> T/C from Detective James Jones of the Youth Section, Baltimore City Police, 396-2042. Detective Jones requesting worker to meet with Detective Richard Falhteich of Homicide Division of Baltimore City Police (9:50 a.m.)
>
> * * *
>
> 11:00 a.m.—Interview of worker by Detective Richard Fahlteich of Homicide, Baltimore City Police at 500 East Baltimore Street, 396-2721 (J.A. 98).

The contempt proceedings themselves also reflect the interrelationship between the contempt action and the homicide investigation. Indeed, the contempt petition states, "this case was referred to the Homicide Division for further investigation due to concern over the welfare of the Respondent [Maurice]." (J.A. 38).

At the hearing on April 20, 1988, the hearing judge observed:

> The child representative, Ms. Watts, has joined in with the Department of Social Services. Apparently, a decision was made to terminate the foster care relationship even in light of the finding by Dr. Eisenberg that it is not recommended that she regain custody of the child, because it does not appear that she is emotionally capable of providing the protection, nurturance, and care that would be required for the child's safety and security.
>
> So, she is in need of intensive and extensive intervention both on emotional and social levels to help her deal constructively with not only her own internal issues but also those requirements for independent and self-sufficient functioning. What that tells me is we have a lady in a severe crisis here. *We also possibly have a dead child somewhere* which just depresses me to no end, I am not going to kid you. (emphasis added)
>
> Since Master Price has recommended the issuance of a warrant, and I have to sign the warrant, I am going to sign the warrant. I'd like to get in touch with somebody in the Police Department to have them go out and take a look into this situation as rapidly as possible. (J.A. 51-52).

The judge was then informed that DSS "had a Homicide detective downstairs in Juvenile Court." (J.A. 52).

After the judge had ordered the arrest of Respondent, counsel for Petitioner (DSS) advised:

> MS. BLIMLINE: Your Honor, if it would be possible too, if the police were sent out, Dr. Eisenberg was concerned that this girl not be treated in any kind of threatening way. He said emotionally, she is functioning at about an eight to ten year old level. So, he feels, especially with the suicide threat she has made, which he thinks we all should take very seriously, he thought the best thing to do was to deal with her as if she were a ten year old child, a very nonthreatening kind of approach.
>
> I don't know what happens when the police go out and pick someone up. But if they could be made aware of, if we ever expect to find out what happened with the child, that we're going to have to treat this lady very gently, I think. (J.A. 53)

Similar concerns were reiterated at the hearing held on May 18, 1988.

> MS. BLIMLINE: Your Honor, the Department would call the case of Maurice Lorenzo M Docket Number 887420. Marilyn Blimline representing the Baltimore City Department of Social Services.
>
> MS. WATTS: Lisa Watts, Legal Aid Bureau, representing the Respondent along with Mitchell Mervis.
>
> MR. LIPMAN: Your Honor, George Lipman and Robin Parsons representing Miss Bouknight. We have a preliminary matter.
>
> THE COURT: This is the time.
>
> MR. LIPMAN: If Your Honor please, at a prior hearing, I understand from Ms. Parsons, she asserted the Fifth Amendment right against self-incrimination and Article 22 of the Maryland Declaration of Rights regarding the right against self-incrimination on behalf of Ms. Bouknight. We are

very adamantly asserting those rights here again today.

If Your Honor please, our position is that this contempt proceeding cannot continue. The contempt situation cannot continue because Miss Bouknight is being held because she is refusing to give up her Fifth Amendment rights against self-incrimination. That's our first preliminary matter.

Our second preliminary matter for the record is we want to assert the Sixth Amendment right to counsel in questioning and the Fifth Amendment. If Your Honor please, I would proffer that in indicating to the State's Attorney's Office, Mr. Glushakow, who is with the Violent Crimes Unit of that office and who is in court today, and Mr. Cohen from the Juvenile Division of the State's Attorney's Office who is also in court today, we had a discussion approximately a half hour ago where to my surprise *I saw my client in the library of the Violent Crimes Unit on the third floor of this courthouse in the company of the detective.*

Your Honor, at that point, I said to Mr. Glushakow and to Mr. Cohen and to the detective that we were asserting the Sixth Amendment right, and we did not want anyone talking to our client because we were representing her, we meaning Robin Parson and George Lipman of the Office of the Public Defender.

So, Your Honor, we wish now to raise both the fifth and Sixth Amendment rights and we would like to present some testimony as to that, move for Your Honor to strike the contempt order and free Miss Bouknight from jail, and we want a record here which I think we just made that we are asserting our Sixth Amendment rights to the Baltimore City Police Department and to the other Police Department and State's Attorney for Baltimore City that we are representing her and we do not want her talked to by any law enforcement officials without our being present.

> And Your Honor, I would like to, if Your Honor please, it is quite elaborate, our motion on the Fifth Amendment. (emphasis added) (J.A. 103-104).

In sum, Petitioner (DSS) accepted all explanations of Maurice's seven month absence without further inquiry or investigation. At the end of that time, what amounts to a major homicide investigation was mounted, culminating in the contempt order.

SUMMARY OR ARGUMENT

I.

The Fifth Amendment privilege against self-incrimination reflects "a judgment . . . . that the prosecution should [not] be free to build up a criminal case . . . with the assistance of enforced disclosure by the accused," and is therefore implicated when asserted "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government." *Doe* v. *United States*, 487 U.S. ___, 101 L.Ed.2d 184, 198-199 (1988). As the Supreme Court of Massachusetts recognized in *Commonwealth* v. *Hughes*, 380 Mass. 583, 404 N.E.2d 1239 (1980), a court order that makes the defendant seek out evidence for the state effectively forces the defendant to be a state's witness and, in this case, production of the child with any injuries would unquestionably permit Respondent to be prosecuted. Petitioner's authorities do not hold to the contrary: they are search cases having only a colorable claim to implicating the Fifth Amendment because of their peculiar facts.

Even were this not the case, "the validity of a claim of privilege turns upon what the answers conceivably may reveal . . . ." *Flager* v. *Derickson*, 134 Ariz. 229, 655 P.2d 349, 352 (1982). If the child is dead and his body no longer

in existence, Respondent is placed in "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964). Anything said that purges Respondent, under these facts, also tends to incriminate her.

II.

The history and purpose of the Fifth Amendment leave little room for balancing, and what little justification for balancing exists extends only to the "periphery," not the core, of the privilege. This case involves the core of the self-incrimination clause—use of the contempt power to force Respondent to disclose information the State's own agents acknowledge almost certainly will tend to incriminate her. The strong governmental interest asserted by Petitioners is no stronger than the governmental interest in convicting wrongdoers. Permitting such balancing would emasculate the privilege.

In any event, as the Department of Social Services appears to recognize (Pt. (DSS) B. at 32 n.25), Petitioners have failed to establish the predicate for balancing in this case: that balancing is necessary. Because a criminal sanction exists for failing to obey the trial court's lawful order to produce the child, Md. Cts. & Jud. Proc. Code Ann. § 3-831, the State's interest in protecting the child can be served without abrogating Respondent's privilege against self-incrimination.

ARGUMENT

I. A COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED INFANT SON COMPELS INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The scope of the Self-Incrimination Clause was recently articulated by this Court:

It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosure of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source . . . . The major thrust of the policies undergirding the privilege is to prevent such compulsion. The Self-Incrimination Clause reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosure by the accused."

* * *

> These policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government. (citation omitted). *Doe* v. *United States*, 487 U.S. ___, 101 L.Ed.2d 184, 198-199 (1988).

One clear corollary of this analysis is that the state cannot compel the accused to "deliver the corpus delicti." *Commonwealth* v. *Hughes*, 380 Mass. 583, 404 N.E.2d 1239 (1980), *cert. denied*, 449 U.S. 900 (1980). *See also Goldsmith* v. *Superior Court In & For Shasta*, 152 Cal. App.3rd 78, 199 Cal. Rptr. 366 (1984).

In *Hughes*, police suspected the defendant of shooting at two people. They obtained a search warrant but were unsuccessful in finding the gun registered to Hughes. He was thereafter ordered to produce the gun or be found in

contempt. The *Hughes* Court noted that the production of the weapon would permit the state to have it examined in an attempt to connect it with the bullets found at the crime scene. It found this improper because, in making the defendant seek out evidence for the state, he was in effect forced to be a witness for the state. In the case at bar, the production of the child with any injuries would unquestionably assist the state in prosecuting Respondent for child abuse or related offenses.

Petitioners' attempt to liken this case to *Schmerber* v. *California*, 384 U.S 757 (1966), and its progeny is ill-founded. These cases are primarily *search* cases where a colorable self-incrimination claim arose only because of the unusual nature of the searches, *i.e.*, examination of the accused's person or characteristics of his person. The *Schmerber* Court was careful to limit its holding:

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it. Tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard." *Id.* at 764.

None of these cases involves forcing the accused to search for evidence for the state. They do not involve, as does

Respondent's case, making the subject an agent or witness for the state.[1]

In any event, this case need not be decided on the narrow ground of whether the effect of producing the child is testimonial. The record demonstrates that the state believed this a homicide case at the time this contempt order was sought. Thus, the worst case scenario must be faced—with or without fault of Respondent, the child is dead and his body no longer in existence. "[T]he validity of a claim of privilege turns upon what the answers conceivably may reveal and not upon what the investigator anticipates uncovering." *Flager* v. *Derickson*, 134 Ariz. 229, 665 P.2d 349, 352 (1982). *See Slochower* v. *Board of Education of New York*, 350 U.S. 556, 557-558 (1956). This scenario places Respondent in "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).[2] By speaking to purge herself, she

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[1] This distinction was recognized in *Doe*, *supra*, when the Court explained why signing the consent form in that case was not testimonial.

> The form does not even identify the relevant bank. Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. The Government must locate that evidence "by the independent labor of its officers." *Id.* at 200.

[2] On behalf of Maurice, the Legal Aid Bureau claims the mother "must affirmatively [raise] the issue of impossibility, . . ." (Pt. (Maurice) B. at 14). *See also* (Pt. (DSS) B. at 23). The illogic of this proposition long ago led to its rejection by this Court:

> However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951).

would provide information that unquestionably tends to incriminate her. *See Curcio* v. *United States*, 354 U.S. 118 (1957).

ARGUMENT

II. THE FIFTH AMENDMENT PRIVILEGE IS IMPLICATED BY A COURT ORDER TO PRODUCE A CHILD AND IS NOT OVERCOME BY ANY IMPORTANT SOCIETAL INTEREST IN PROTECTING CHILDREN IN JEOPARDY OF SERIOUS INJURY.

The nature of the privilege against self-incrimination leaves little room for balancing.

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and

> misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness. *United States* v. *White*, 322 U.S. 694, 698-699 (1944).

Because no reason exists for the government to try to force disclosures absent some need for the information, assertion of such overriding state interests is common in Fifth Amendment litigation. *Lefkowitz* v. *Turley*, 414 U.S. 70, 78 (1973). These assertions have been consistently rejected.

> We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need. *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 808 (1977).[3]

What little *balancing* may be present in Fifth Amendment litigation[4] involves the *periphery* and not the *core* of

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[3] Unsuccessful attempts to diminish the privilege against self-incrimination predate the adoption of the privilege in the constitution. The privilege evolved despite governmental attempts to compel evidence in support of prosecutions for treason, sedition and failure to support state sponsored religion. L. Levy, *Origins of the Fifth Amendment*, 324-332, 430-432 (2d ed. 1986). *See The King* v. *Lord George Gordon*, 99 Eng. Rep. 372 (1781) (the privilege may be exercised without restriction even where treason is charged).

[4] As *Levy, supra*, notes, the privilege evolved as a protection for the individual against the State's perceived overriding interest in its own preservation. By the time the Fifth Amendment was drafted, the privilege had developed to the point where it could be asserted without restriction even where, as in a treason case, the very existence of the State was threatened. *E.g. The King* v. *Lord George Gordon*, *supra*. Given this, it is difficult to imagine that the original intent of the amendment's drafters can be squared with any sort of balancing.

the privilege. A "narrow exception" has been recognized to the *Miranda* rule in the case of overwhelming and immediate pubic danger. *New York* v. *Quarles*, 467 U.S. 649 (1984).

However, police interrogations, by their very nature, do not involve the core of the privilege because the person interrogated does not face the "cruel trilemma." The police, absent illegal physical violence, have no means of compelling testimony, and what is said to the police is not under oath. Hence, there is no danger of perjury or contempt involved in police interrogations. *Quarles*, *supra* at 669-671 (O'Connor, J., concurring).[5] This point was emphasized in *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979).

> The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination. Balancing of interests was thought to be necessary in *Harris* and *Hass* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

The rationale underlying the plurality opinion in *California* v. *Byers*, 402 U.S. 424 (1971), places that opinion

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[5] *People* v. *Salinas*, 131 Cal. App. 3d 925, 182 Cal. Rptr. 683 (1982), cited by Petitioners, is arguably similar to *Quarles*. A mother replied to questions by a police officer and a physician relating to her severely injured child. The appellate court held that the interrogations were not in violation of the *Miranda* rule because Ms. Salinas was not in custody. In *dicta* the court noted that under such an extreme emergency questioning might be permissible in any event without giving *Miranda* rights.

on the periphery of the Fifth Amendment privilege. In *Byers*, this Court considered the effect of a California statute requiring that a motorist involved in an automobile accident must supply his name and address and not leave the scene. The plurality noted that the statute was not aimed at a group particularly suspected of criminal activity, that the acts required were "neutral", and that the state purpose served by the statute was "always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries." *Id.* at 433. Two of these rationales distinguish *Byers* from this case, in which the core of the Fifth Amendment privilege is involved, while the third acknowledges the primacy of the privilege when its core is implicated. *Byers* involved a neutral state regulation; Respondent is the subject of a homicide investigation, and is being ordered to disclose the whereabouts of her supposed victim.

This case involves the core of the Self-Incrimination Clause—use of the contempt power to force Respondent to disclose information the State's own agents acknowledge almost certainly will tend to incriminate her. Any balancing in this case would result in the abrogation of the privilege. There is no principled way to limit the circumstances in which the privilege may be balanced away once a witness can be compelled to answer because of a "strong" government interest. Indeed, there is a "strong" interest in prosecuting wrongdoers in virtually every criminal case.[6] Recognizing that balancing of this sort

[6] This case involves the Fifth Amendment; therefore it is not necessary to discuss the possibilities of balancing with regard to every other amendment. Nevertheless, in attempts to draw analogies with the First Amendment, Petitioners demonstrate a persistent, fundamental misunderstanding of balancing in that context which calls for explanation. First, although there is not a gradation of importance between amendments, the language and purposes of different amendments are sufficiently dissimilar to preclude identical analysis. Specifically, at its core, the Fifth Amendment is, unlike the First Amendment, purely passive, *i.e.*, there is no Fifth Amendment analogy to forcing a child to forego a needed blood transfusion or having the child distribute leaflets. For example, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), involved limitations not on parents' right to practice their religion but on their "right" to have their children distribute leaflets. The *Prince* decision contained the caveat: "Our ruling does not extend beyond the facts the case presents." *Id.* at 171.

In sum, Petitioners have made the same mistake of confusing core and peripheral values in their analysis of the First Amendment that they have made in discussing the Fifth Amendment.

would emasculate the Fifth Amendment, one of its most hostile critics concedes that "almost no one would favor confining a man to jail until he takes the stand to testify to his own crime." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 Cinn. L. Rev. 671, 695 (1968).

Moreover, an independent problem with Petitioners' demand for balancing exists. Even where only the periphery of the right is involved, the first prerequisite for balancing is that it is necessary. The Court of Appeals of Maryland noted that Respondent "may be criminally punishable under § 3-831 of the Courts Article." (App. Pet. Cert. 53a). This means that a person who refuses a lawful order to produce her child may be prosecuted and incarcerated, and therefore that no limitation need be placed on her Fifth Amendment privilege to accomplish the state's purpose.

The Department of Social Services, aware of this crucial flaw in its analysis, attempts to mitigate the problem with a curious footnote.

> The court below perceived another, but plainly illusory, alternative. It concluded that "Bouknight's conduct may be criminally punishable under § 3-831 of the Courts Article." App. Pet. Cert. 531. *See also id.* 42a n.3. This conclusion is inexplicable on two grounds, one practical and one constitutional. Criminal prosecution is hardly a practical solution because it is not a speedy way to obtain a child who may be at imminent risk. Further, if Ms. Bouknight's conduct is constitutionally immunized, and that is the holding below, it is difficult to see how she can be prosecuted for this "constitutionally protected" activity. (Pt. (DSS) B. at 32 n.25).

People are routinely imprisoned on criminal charges. Why being imprisoned awaiting trial on a criminal charge would not encourage production of the child, while imprisonment for civil contempt would, is not explained by Petitioner and is, on its face, inexplicable. The second claim, that if Respondent cannot be made to incriminate herself, she cannot be prosecuted pursuant to § 3-831, is no more persuasive. The criminal prosecution is based on an act or omission. It does not depend on Respondent doing or saying anything, and therefore does not implicate the Fifth Amendment at all. Most certainly it does not depend on Respondent incriminating herself as to other possible criminal charges, *e.g.*, child abuse or murder.

Section 3-831 is a modern version of a means lawmakers have historically used to deal with similar problems without violating the privilege against self-incrimination. In seventeenth century England authorities were faced with the problem of mothers killing their illegitimate infants. Prosecution was difficult because of the need to prove that the infant had been born alive and killed rather than stillborn. The legislative response in 1624 was to make concealment of a birth a crime. Thus, the twin goals of

discouraging infanticide and not compelling evidence from the mothers were achieved. P. Hoffer and N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* 24-26 (1984). The same effect had been achieved even earlier in France by proclamation of a royal edict in 1556. *Gallick Reports* XXIII (1737). Legislatures can and have dealt with this and similar problems: the need to balance the Self-Incrimination Clause to achieve the desired result is non-existent.

Particularly in a case such as Respondent's, the state's attempt to declare a belated "state of emergency" is made with singular ill grace. The child had not been seen by social workers for seven months when the "emergency" was proclaimed. What constitutes an "emergency" is narrowly defined even when only attenuated Fifth Amendment rights under the Miranda Rule are implicated:

> Although it involves police question in part relating to the whereabouts of a gun, *Orozco* v. *Texas*, 394 U.S. 324 (1969), is in no sense inconsistent with our disposition of this case. In *Orozco* four hours after a murder had been committed at a restaurant, four police officers entered the defendant's boardinghouse and awakened the defendant, who was sleeping in his bedroom. Without giving him Miranda warnings, they began vigorously to interrogate him about whether he had been present at the scene of the shooting and whether he owned a gun. The defendant eventually admitted that he had been present at the scene and directed the officers to a washing machine in the back room of the boardinghouse where he had hidden the gun. We held that all the statements should have been suppressed. In *Orozco*, however, the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short there was no exigency requiring

immediate action by the officers beyond the normal need expeditiously to solve a serious crime. *Quarles*, *supra*, at 660 n.8.

In sum, Petitioners have demonstrated neither justification nor need to balance Respondent's concededly well-grounded fear of self-incrimination against any valid state interest. Even if the questionable proposition that balancing could be justified is accepted, the fact that procedures already exist to protect the legitimate interests of Petitioners preclude its application to this case. Their claims to the contrary amount to nothing more than an ill-disguised argument that an inquisitorial system is easier for the state than is an accusatorial system. It is easier, but is not better. The type of system advocated by Petitioners is strikingly illustrated by the Japanese system of justice prior to the American occupation in 1945.

An American officer named Kimberling from the Public Safety Division walks into a Tokyo police station. His boss, Engle, has sent him to inspect the lock-ups. Kimberling talks with the Japanese station chief about the prisoner in the first cell. The prisoner watches them through the wood bars.

"Why is this man here?"

"For stealing a kitchen knife."

"How long has he been here?"

"Two months."

"Two months for stealing a kitchen knife?"

"Yes."

"How long is his sentence?"

"He hasn't been sentenced."

"Why is he being held without a sentence?"

"He hasn't been tried yet."

"Why hasn't he been tried yet?"

"He hasn't confessed yet."

W. Triplett, *Flowering of the Bamboo* 29 (1985).

The privilege against self-incrimination is an explicit rejection of the inquisitorial method. "I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized." E. Griswold, *The Fifth Amendment Today* 7 (1955). The decision of the Court of Appeals is not only historically and analytically correct; it is a necessary application of the privilege against self-incrimination. It should be affirmed.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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No. 88-1182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

On Writ Of Certiorari
To The Court of Appeals of Maryland

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1182

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

On Writ Of Certiorari
To The Court of Appeals of Maryland

REPLY BRIEF FOR PETITIONER

REPLY ARGUMENT

The Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be *a witness* against himself." Thus, the Fifth Amendment protects an individual only from producing incriminating *testimony*. Here, because no *testimony* was compelled, and respondent does not claim to the contrary, the Fifth Amendment privilege is not properly invoked. Moreover, even if respondent enjoyed a Fifth Amendment privilege to avoid complying with the order to produce her child,

that privilege is overcome by society's overwhelming interest in protecting children, like infant Maurice, at risk of serious injury.

I. THE JUVENILE COURT'S ORDER TO PRODUCE THE CHILD DOES NOT COMPEL TESTIMONY; THEREFORE, THE ORDER DOES NOT IMPLICATE THE FIFTH AMENDMENT PRIVILEGE.

Petitioner Baltimore City Department of Social Services ("BCDSS" or the "State") maintains that respondent Bouknight must comply with the juvenile court's order to produce her child because (1) she is able to do so; (2) she can do so without speaking to any representative of the State; and (3) her act of production would have no testimonial significance since it would not add to the State's knowledge about Maurice's existence, possession, or identity as these are truly "foregone conclusion[s]." (State's Brief at 23, 14, 19-22, *quoting Fisher v. United States*, 425 U.S. 391, 411 (1976).) Respondent does not dispute any of these contentions.

Instead, respondent claims that "this case need not be decided on the narrow ground of whether the effect of producing the child is testimonial." (Brief at 10.) If not a dispositive concession, this statement at least establishes that respondent fundamentally misunderstands the reach of the Fifth Amendment. This Court has held repeatedly that the constitutional privilege against self-incrimination does not apply unless the compelled communication is testimonial. *See, e.g., Doe v. United States*, 487 U.S. ___, 108 S.Ct. 2341, 2346 n.6 (1988) ("If a compelled communication is 'not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence.' ") (citation omitted). The Fifth

Amendment simply does not protect Ms. Bouknight from being compelled to produce *nontestimonial* evidence within her control.[1]

In an effort to avoid the holdings of cases such as *Schmerber v. California*, 384 U.S. 757 (1966), respondent asserts that these "are primarily *search* cases where a colorable self-incrimination claim arose only because of the unusual nature of the searches." (Brief at 9) (emphasis in original.) Respondent is wrong. *Schmerber*, *Doe*, *United States v. Dionisio*, 410 U.S. 1 (1973), *United States v. Wade*, 388 U.S. 218 (1967), and *Holt v. United States*, 218 U.S. 245 (1910), are not "search" (Fourth Amendment) cases at all. Rather, in each of these cases, the defendant's attempt to bring nontestimonial conduct within the ambit of the Fifth Amendment was rejected. Respondent's attempt should be similarly rejected.

II. EVEN IF THE JUVENILE COURT'S ORDER DID IMPLICATE RESPONDENT'S FIFTH AMENDMENT RIGHTS, THE ORDER IS VALID BECAUSE THOSE RIGHTS ARE OVERCOME BY SOCIETY'S INTEREST IN PROTECTING CHILDREN FROM SERIOUS INJURY.

As this Court's decisions make plain, the core of the Fifth Amendment is protection from *testimonial* compulsion. *See generally* State's Brief at 12-24. Because respondent's compliance with the order to produce would have no testimonial significance, her Fifth

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[1] Like the court below, respondent places enormous emphasis on the potential incriminating nature of producing the child. *See, e.g.*, Brief at 1-6, 10. While Ms. Bouknight may have a reasonable fear of incrimination, *accord* State's Brief at 12-13 n.13, that fear alone does not entitle her to claim Fifth Amendment protection.

Amendment claim is, at best, a weak one.[2] The highly attenuated relationship between the order to produce and the intent and purpose of the Fifth Amendment must influence the weight given to Ms. Bouknight's interests, particularly because her interests are asserted at the expense of the right of her child to be free from further harm and society's manifest interest in protecting that right.

Unquestionably, the State acted here in a nonprosecutorial *parens patriae* capacity to protect a child at risk. *See Schall v. Martin*, 467 U.S. 253, 265 (1984). The juvenile court had extensive involvement with Ms. Bouknight and Maurice long before the court issued (or had any occasion to issue) the order to produce. Following shocking undisputed evidence of child neglect and abuse, *see* J.A.8-21, 27-28, Ms. Bouknight regained custody of her child as a result of the juvenile court's Order of Protective Supervision, an order to which she agreed. (App. Pet. Cert. 85a-87a.) BCDSS sought the order to produce the child, and then contempt, not to prosecute Ms. Bouknight, but because she failed to cooperate with BCDSS, as required by the Order of Protective Supervision, and reveal the whereabouts of Maurice. (J.A.33-39.)[3]

[2] Ms. Bouknight largely concedes that the order to produce has no testimonial significance (*e.g.*, Brief at 10), but then she argues that any balancing is inappropriate because her case allegedly involves "the core of the Self-Incrimination Clause." (*Id.* at 14.) The case she relies upon most heavily, *New Jersey v. Portash*, 440 U.S. 450 (1979), demonstrates just the reverse. *Portash* involved a criminal defendant who had testified before a grand jury under a grant of use immunity, and the issue was whether that *testimony* could be used to impeach him in a later criminal trial. By contrast, Ms. Bouknight has never been required to testify, but only to produce her child before the juvenile court. *See* J.A.155-56.

The magnitude of the State's interest in seeking to protect children at risk of parent-inflicted injury cannot be overstated. Tragically, Maurice and children like him are at great risk, and they would be literally defenseless if the State were denied the tools to provide them with minimal protection. While respondent is correct that the State has "a strong interest in prosecuting wrongdoers in virtually every criminal case" (Brief at 14), the State's interest here is a unique and overwhelming one which certainly goes beyond its interest "in virtually every criminal case." Therefore, and contrary to respondent's claim (*id.* at 14), the State's interest in child protection provides a thoroughly "principled way" to distinguish between the juvenile court's order to produce the child and compelling a criminal suspect to be a witness against himself.

Respondent also argues that there is no need to balance Ms. Bouknight's Fifth Amendment interests because criminal prosecution is an alternative to civil

[3] *See In re Maurice M.*, 314 Md. 391, 419, 550 A.2d 1135, 1148-49 (1988) (McAuliffe, J., dissenting) (App. Pet. Cert. 75a):

> Maurice was taken into custody for his protection. Every effort of the juvenile court and DSS has been to further the best interests of the child and, if possible, to reunite him with his mother. Even in the face of evidence of child abuse, no criminal charges were brought. Viewing the entire history of this case in perspective, it cannot rationally be suggested that the motive of DSS in seeking a court order for the production of Maurice was to gain evidence for use in a criminal prosecution.

contempt (*id.* at 15-17) and suggests that she could properly be coerced into producing the child by "being imprisoned awaiting trial on a criminal charge." (*Id.* at 16.) Criminal prosecution, with its higher burden of proof and all its attendant problems, delays, and uncertainties, is not a substitute for civil child protection proceedings. Indeed, the juvenile court and BCDSS have no authority to bring criminal charges against Ms. Bouknight, but only the authority to protect Maurice. That authority should not be stripped.[4] In addition, respondent's suggestion of criminal pros ecution and pretrial detention with the ulterior motive to "encourage production of the child" would be a plain abuse of the judicial process. *See United States v. Powell*, 379 U.S. 48, 58 (1964); *Standing Committee on Discipline of the United States District Court v. Ross*, 735 F.2d 1168, 1172 (9th Cir.), *cert. denied*, 469 U.S. 1081 (1984).

Respondent also makes the meritless suggestion that BCDSS' alleged failure to monitor Maurice after he was returned to his mother somehow bars the State from asserting that an "emergency" exists. (Brief at 17.) The juvenile court ordered Ms. Bouknight to produce Maurice because the undisputed facts established that he was in imminent danger; any al-

[4] Moreover, respondent does not adequately explain how she can be prosecuted for violating the order to produce her child when Maryland's highest court held that the order violated her Fifth Amendment rights. Respondent's attempted explanation of this contradiction is that "[t]he criminal prosecution is based on an act or omission." (Brief at 16.) Precisely the same is true, of course, of the contempt order: it is based entirely on respondent's act of refusing to produce her child in court, not because she failed to speak. *See* J.A.155-59.

leged negligence on the part of BCDSS is simply irrelevant to the court's proper effort to protect him. Thus, regardless of whether the agency was negligent and that negligence somehow contributed to Maurice's disappearance, the juvenile court should not be denied the power to act to find him.

Notwithstanding respondent's protestations to the contrary, this case is not about the relative merits of an accusatorial versus an inquisitorial system of criminal justice. (*Id.* at 18-19.) Rather, this case involves the scope of the privilege against self-incrimination in our accusatorial system; whether that privilege reaches nontestimonial conduct; and, if it does, whether Ms. Bouknight's interests are outweighed by Maurice's right to be free from further harm and the State's interest in protecting that right. Because the juvenile court's order does not compel testimony, the Fifth Amendment does not relieve Ms. Bouknight of her responsibility to produce Maurice. Alternatively, if the order implicates the Fifth Amendment, it does so in a very minimal way and Ms. Bouknight's rights are overcome by society's overwhelming nonprosecutorial interest in protecting children.

CONCLUSION

For the reasons stated herein and in the State's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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REPLY

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OCTOBER TERM, 1989

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
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MAURICE M.,
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JACQUELINE BOUKNIGHT,
Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of Maryland

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REPLY ARGUMENT

I. THE RESPONDENT HAS FAILED TO APPLY THE TESTIMONIAL ANALYSIS OF *FISHER* AND *SCHMERBER*.

This Court has repeatedly held that an order to produce evidence may be barred by the Fifth Amendment privilege only if the act of production itself communicates significant and incriminating testimonial information. *Doe* v. *United States*, 487 U.S. ___, 108 S.Ct. 2341 (1988) ("*Doe II*"); *United States* v. *Doe*, 465 U.S. 605 (1984) ("*Doe I*"), *Fisher* v. *United States*, 425 U.S. 391 (1976); *Schmerber* v. *California*, 384 U.S. 757 (1966). Nevertheless, Ms. Bouknight shuns this well-settled test, implying instead that the juvenile court's otherwise valid order to present Maurice was somehow tainted by a police investigation then underway. (Resp. Br. at 3, 6, 10). Factually and legally, Ms. Bouknight is wrong; the existence of a collateral criminal inquiry did not prompt the juvenile court to order Maurice's production and does not affect the limited questions presented to this Court. More important, Ms. Bouknight has failed to explain why production of Maurice would necessarily reveal testimonial information not already known or assumed by the juvenile court. Put simply, she has not established a *prima facie* claim of privilege.

A. Police Activity Is Not A Relevant Consideration.

Contrary to Ms. Bouknight's insinuations that the juvenile court acted in concert with the police to compel her to reveal incriminating evidence, (Resp. Br. at 2, 5), the court's singular concern was, and is, Maurice's protection. Throughout the proceedings, the court spoke evocatively of its imperative duty to find and safeguard Maurice. On April 20, Judge Angeletti explained,

> [W]e are not picking [the mother] up for purposes of punishing her. We are picking her up in an effort to find her child.

* * *

> What this court has to look at is what is in the best interest of the child. And quite frankly, that child is paramount on this court's mind . . . . [T]he child is a baby. Based on all the information before the [c]ourt, it is obvious that the child is in some jeopardy because of the actions of the mother in refusing to bring her [sic] in.

(J.A. 53-54). Similar sentiments were voiced by Judge Mitchell at subsequent hearings:

> [April 28] No one asked her what has happened to the child or whether she committed any act that in anyway [sic] harmed the child. The only thing that is required here is that she produce the child pursuant to the order of this [c]ourt.
>
> * * *
>
> [May 25] It is a given fact that there is great fear for this child.
>
> * * *
>
> The State has indicated that the child is at risk. We don't [know] where the child is—a 19-month old child whose whereabouts . . . is unknown, is at risk under any circumstances.

(J.A. 72, 152-53). The juvenile court ordered Maurice's production solely to enforce its order of shelter care and ensure his safety, not to further an independent homicide investigation. In any case, since the issue only addresses the reasonableness of Respondent's fear of incrimination, it is irrelevant to the narrow testimonial question at hand.

Ms. Bouknight's claim that "the state believed this a homicide case at the time this contempt order was sought," (Resp. Br. at 10), is similarly disingenuous. At most, the record reveals that the assigned protective services worker thought homicide possible, (J.A. 90, 95), and that he communicated with a homicide detective when

conducting his own search for Maurice. (J.A. 93). While Petitioner Baltimore City Department of Social Services ("BCDSS") and the court have acknowledged the possibility that Maurice might no longer be alive, their concern hardly constitutes a binding legal position.[1] The simple facts remain that (1) an independent police investigation neither converts the civil proceedings below into a homicide trial nor establishes a prosecutorial purpose lurking behind the court order; (2) the evidence in this case indicates that Maurice is missing without explanation, not that he has been fatally injured; and (3) the juvenile court has conclusively determined that Maurice is at risk of harm and in need of protection.

B. Maurice's Condition Does Not Affect The Testimonial Analysis.

Assuming, however, that Ms. Bouknight's "worst case scenario" (Resp. Br. at 10) is true and Maurice is dead, the court's order still poses no threat of compelled testimony. Production of a deceased child holds no more *testimonial* significance than does presentation of the same child alive. Obviously, any evidence of severe harm or fatality would elevate Ms. Bouknight's fear of incrimination, but, as the *Fisher* court recognized, the inculpatory nature of a subject has no bearing on whether its production is testimonial: "[H]owever incriminating the contents of the accountant's workpapers might be, the act of producing

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[1] The mother's effort to cast this case as a homicide investigation contradicts her own consistent reassurances to the court and BCDSS that Maurice is alive, healthy, and well-placed. (J.A. 42, 54, 65-66, 70, 83, 87). Even though these statements directly undermine the validity of her fear of incrimination, she offers no explanation why her position in court should be disregarded in favor of speculation by the court and a protective service worker.

them . . . would not itself involve testimonial self-incrimination." 425 U.S. at 410-11. Thus, in emphasizing the possibility that Maurice might be dead, the mother merely conflates her fear of incrimination with the separate testimonial analysis mandated by *Fisher*, *Doe I* and *Doe II*.

Ms. Bouknight's second assumption, that Maurice's "body [might] no longer [be] in existence," (Resp. Br. at 10), does not alter the testimonial analysis, either. A party unable to comply with a civil court's or legislature's valid order of production bears the burden of asserting impossibility and persuading the tribunal. *United States* v. *Rylander*, 460 U.S. 752, 757 (1983); *McPhaul* v. *United States*, 364 U.S. 372, 379 (1960); *United States* v. *Fleischman*, 339 U.S. 349, 362-63 (1950). Even if Ms. Bouknight's explanation of impossibility were potentially incriminating, the Fifth Amendment privilege would not excuse her from satisfying either burden.

> But while the Fifth Amendment privilege against compulsory incrimination may be a valid ground upon which a witness . . . declines to answer questions, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production.

United States v. *Rylander*, 460 U.S. at 758. So long as the order to produce Maurice is itself valid, the mother must produce him or assert her inability to comply. In any case, the issue is not yet ripe. Since Ms. Bouknight has never suggested that compliance is impossible in fact, she cannot now ask the Court to assume impossibility simply because it is conceivable in theory.[2]

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[2] The deference accorded to fears of potential incrimination does not extend to impossibility, an analytically distinct issue. Contrary to Ms. Bouknight's assertion, (Resp. Br. at 10 n.12), *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951), never addressed impossibility. Indeed, in those cases where this Court has considered the nexus between impossibility and the Fifth Amendment, it has "squarely rejected the notion that a possible failure of proof of an issue where the defendant had a burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." *United States* v. *Rylander*, 460 U.S. at 758.

As for the "act of production" analysis itself, Respondent offers scant authority to explain why Maurice's production would be testimonial. Her claim that *Schmerber* is limited to "search cases", for instance, ignores repeated decisions by this Court which have upheld the testimonial standard without even mentioning the Fourth Amendment.[3] Furthermore, Respondent's analogy to state court decisions which prohibit production of a "corpus delecti" fails to consider the impact of her legal relationship to Maurice. When Ms. Bouknight regained physical and legal custody of her son, she settled as a matter of law any question about his subsequent control or dominion. If she produces Maurice as directed, she communicates nothing new—she merely confirms the legal presumption that she retains custody. Unlike the criminal suspects in the "corpus delecti" cases, who had no custodial relationship with the items in question, Ms. Bouknight's legal obligation to care for Maurice leaves her no privilege to conceal him from the juvenile court. *See, e.g.*, *Braswell* v. *United States*, 487 U.S. ___, 108 S.Ct. 2284, 2291-93 (1988); *Bellis* v. *United States*, 417 U.S. 85, 101 (1974).[4]

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[3] *See, e.g.*, *United States* v. *Wade*, 338 U.S. 218, 221 (1967); *Gilbert* v. *California*, 388 U.S. 263, 266-67 (1967), *Holt* v. *United States*, 218 U.S. 245, 252-53 (1910). The theory does not account for *Fisher* and subsequent "act of production" cases involving documents, not physical characteristics, of a suspect.

[4] Respondent's situation is more analogous to a bankrupt's duty to submit all private papers and possessions to the appropriate civil

II. THE RESPONDENT HAS FAILED TO CONSIDER THE COMPELLING INTEREST IN PROTECTING CHILDREN AT RISK OF INJURY.

Virtually every Fifth Amendment case previously considered by this Court has involved only two conflicting interests—the state's need for information and the suspect's fear of self-inculpation. Here, however, an innocent third party is directly affected by the mother's claim of privilege. Thus, for the first time in its Fifth Amendment jurisprudence, this Court is confronted with competing individual rights. It cannot uphold Ms. Bouknight's autonomous right against state compulsion without also eclipsing Maurice's own right to continuing protection by the state. Although Ms. Bouknight neither discusses Maurice's interests nor attempts to reconcile them with her own assertions of privilege, the necessity of choosing among these conflicting rights is inescapable.

A. The Juvenile Court's Order To Produce Maurice Does Not Compromise Core Values Of The Fifth Amendment.

Ms. Bouknight correctly notes that balancing should not be employed if crucial interests protected by the privilege are at stake. (Resp. Br. at 12-13). But, as she also acknowledges, *id.*, balancing is appropriate when the order in question only peripherally involves the historical purpose of the privilege—*i.e.*, "the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." *Doe II*, 108 S.Ct. at 2348. For a number of reasons, her claim lies at a distant

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court even if incrimination would ensue. Once the court lawfully transferred custody of Maurice, "[t]he question [was] not one of testimony but of surrender." *In re Harris*, 221 U.S. 274, 279 (1911). *See also McCarthy* v. *Arndstein*, 266 U.S. 34, 41 (1924).

frontier from the protections traditionally afforded by the privilege.

First, an order of production constitutes a much weaker individual intrusion than does a command to testify under oath. The distinction has been drawn repeatedly, from the early twentieth century cases of *In re Harris* and *McCarthy* v. *Arndstein* to more modern cases such as *Curcio* v. *United States*, 354 U.S. 118, 123-24 (1957) and *United States* v. *Rylander*, 460 U.S. at 760, and culminating recently in *Braswell* v. *United States*, 108 S.Ct. at 2293. Aside from actual testimony, this Court has afforded full protection only to private books and records, and then only because they "are generally little more than an extension of [one's] person." *Fisher* v. *United States*, 425 U.S. at 420 (Brennan, J. concurring). Since Maurice's surrender would not expose Ms. Bouknight's "private inner sanctum of individual feeling and thought," *Couch* v. *United States*, 409 U.S. 322, 327 (1973), only limited testimonial incrimination could result: an acknowledgement that she has control over her son as ordered by the court. That reaffirmation of her parental status is a far cry from the inquisitorial fears which spawned and sustained the privilege.

Second, as the mother concedes, (Resp. Br. at 13-14), incriminatory disclosures that are compelled by neutral, noncriminal statutes also lie at the fringe of the privilege. *California* v. *Byers*, 402 U.S. 424 (1971). The juvenile court's order here was expressly authorized by such a statute, Md. Cts. & Jud. Proc. Code Ann. ("CJP") § 3-814(c), and thus falls squarely within the *Byers* ambit. No meaningful distinctions can be drawn between § 3-814(c) and the *Byers* "hit and run" statute, *see* Maurice's Br. at 30-34, and Ms. Bouknight suggests nothing to the contrary. Indeed, Ms. Bouknight's only

response is to repeat her "homicide investigation" argument, (Resp. Br. at 14), even though the *Byers* analysis explicitly disregards an individual suspect's particular fear of incrimination. *California* v. *Byers*, 402 U.S. at 428 (Burger, C.J. plurality). Of course, had the Maryland statute expressly authorized sanctions against parents for exercising their fifth Amendment rights, balancing would not be permissible. *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977).[5] Yet § 3-814(c) does not punish privileged activity any more than it "evidences the purpose of gathering information from citizens to secure their conviction of a crime." *Marchetti* v. *United States*, 390 U.S. 39, 73 (1968) (Brennan, J. concurring). In forty-eight states and the District of Columbia, all with statutes parallel to § 3-814(c), compelling parents to bring their children at risk to court does no violence to the Fifth Amendment. *See* Maurice's Br. at 1a.

Most important, Maurice's independent interest in receiving court-ordered protection by the state, and the state's *parens patriae* responsibility to provide that protection, make this a unique Fifth Amendment case. Potential danger to Maurice constitutes the obvious crux of the balancing question before the Court, yet his mother completely sidesteps the issue, claiming that the state's interest is no stronger here than in any criminal prosecution. (Resp. Br. at 14). It is Ms. Bouknight's refusal to surrender Maurice which endangers him. Thus, her

[5] The *Lefkowitz* cases cited by Ms. Bouknight do not proscribe all instances of balancing under the Fifth Amendment, just the explicit practice of penalizing an assertion of privilege. Both *Lefkowitz* v. *Cunningham*, *id.*, and its forebear, *Gardner* v. *Broderick*, 392 U.S. 273, 278-79 (1968), expressly permit the imposition of sanctions against an individual who asserts the privilege so long as the penalty is directed at the general failure to fulfill a public duty.

assertion of privilege cannot be labeled as "purely passive", (Resp. Br. at 14 n.16), or otherwise distinguished from this Court's decisions which temper constitutional protections of adults when the health or welfare of children are jeopardized. Even in a Fifth Amendment context, *New York* v. *Quarles*, 467 U.S. 649 (1984), applies a comparable analysis, waiving the Miranda rule if its exercise could threaten innocent third parties. Under any appropriate balancing of interests, the possibility, indeed the strong probability, that Maurice is alive and at risk must outweigh Respondent's hypothetical speculation that he could be dead.

B. Criminal Prosecution Is No Solution To Maurice's Immediate Need For Protection.

Contrary to Respondent's assertion, (Resp. Br. at 13-14), her failure to produce Maurice is not a crime under CJP § 3-831. That statute requires proof beyond a reasonable doubt that an adult's conduct "renders a child . . . in need of assistance." Without Maurice's appearance, however, the state cannot possibly know the effect of Ms. Bouknight's defiance. No evidence of injury exists, and his concealment alone is not dispositive of whether he has been placed in further need of assistance.[6] Surely Respondent is not suggesting that she can and should be

[6] The mother's analogy to English and French Renaissance criminal bans against the concealment of birth only reinforces the futility of applying § 3-831. Those laws presumably succeeded because they targeted the act of concealment itself, not the actual injury, if any, to the infant. It is no crime in Maryland to harbor one's own child. Indeed, prosecution is not even a rational alternative to civil contempt since it offers no guarantee of incarceration or opportunity for purgation.

prosecuted for the conjectural possibility that she may have committed a criminal act.

Even if prosecution were possible, under Respondent's reading of the Fifth Amendment it would be unconstitutional. Both the "crime" in question and the order of contempt target identical conduct—Ms. Bouknight's refusal to produce her son. As BCDSS has noted, (Br. at 32 n.25), if the Fifth Amendment immunizes her recalcitrance against the lesser sanction (civil contempt) it must also shield her against the stronger (criminal conviction). *See Lefkowitz* v. *Cunningham*, 431 U.S. at 806 (1977). Respondent's advocacy of prosecution under § 3-831 is more than ironic; it oddly resembles Petitioners' arguments that no testimonial disclosure has been compelled: "The criminal prosecution . . . does not depend on Respondent doing or saying anything, and therefore does not implicate the Fifth Amendment at all." (Resp. Br. at 16).

C. Maurice's Safety Must Be This Court's Paramount Consideration.

The urgency of locating and sheltering a missing, previously abused two year old child should be obvious. Ms. Bouknight nonetheless disputes any potential danger, contending that Maurice cannot be at risk since BCDSS enforcement of its duty to protect and supervise him was so dilatory. To be sure, the conduct of BCDSS may expose the agency and its workers to civil and even criminal liability if Maurice has been severely harmed. *See DeShaney* v. *Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1006-07 (1989); J.A. 134. Still, as with Joshua DeShaney, the Department's failure to provide appropriate protective supervision only compounds the degree of risk to Maurice. *See*

id., at 1011 (Brennan, J. dissenting), 1013 (Blackmun, J. dissenting). More important, BCDSS' actions are irrelevant; the juvenile court has already determined that Maurice is at risk and requires immediate protection, a dispositive finding which Respondent has never challenged or appealed. Blaming BCDSS may divert attention away from her own noncompliance, but it does not hide the simple fact that Ms. Bouknight's fear of incrimination may very well reflect Maurice's dire need.

Ultimately, all parents must be held accountable for the care they provide their children. This Court has already recognized a substantial number of overriding public interests which inveigh upon the outer scope of the privilege: prosecution of white collar crime, *Braswell* v. *United States*, 108 S.Ct. at 2294; public safety, *New York* v. *Quarles*, 467 U.S. at 655-56; deterrence of drunk driving, *South Dakota* v. *Neville*, 459 U.S. 553, 558 (1983); traffic accident reporting, *California* v. *Byers*, 402 U.S. at 428; bankruptcy adjudication, *McCarthy* v. *Arndstein*, 266 U.S. at 41; and corporate regulation, *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906). Ms. Bouknight has yet to explain why this Court should find the important societal interest in protecting children at risk of harm any less crucial.

CONCLUSION

For the foregoing reasons and those presented in Petitioner's first brief, the decision of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(6)

Nos. 88-1182, 88-6651.

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BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER,

v.

JACQUELINE BOUKNIGHT,
RESPONDENT.

MAURICE M.,
PETITIONER,

v.

JACQUELINE BOUKNIGHT,
RESPONDENT.

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No. 88-1182, 88-6651

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,
v.
JACQUELINE BOUKNIGHT,
Respondent

- and

MAURICE M.,
Petitioner,
v.
JACQUELINE BOUKNIGHT,
Respondent.

BRIEF OF THE
COMMONWEALTH OF MASSACHUSETTS,

AS AMICI CURIAE IN
SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The States identified above submit this brief amici curiae in support of petitioner. The States have a compelling interest in protecting

children from abuse and neglect. To serve that interest, the States have created departments or agencies to receive reports of suspected abuse or neglect, to conduct investigations, and to provide protective services to children and families.[1/]

On the basis of their experience, amici have come to the conclusion that the direct access of these agencies to suspected victims of child abuse or neglect is crucial to the effectiveness of their efforts to protect such children. In most cases amici must depend for such access on the cooperation, whether voluntary or

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1/ See, e.g., Mass. Gen. L. ch. 119, §§ 51A-B; 29 Del.C. ch. 90. See also DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1010-11 (1989) (Brennan, J., dissenting) (describing Wisconsin statutory scheme); Darryl H. v. Coler, 801 F.2d 893, 895-96 (7th Cir. 1986) (describing Illinois statutory scheme and practice).

compelled, of the child's parents or other custodians. For the reasons set forth, infra, amici believe that affirmance by this Court of the judgment below would drastically impair their ability to provide protection for children in jeopardy.

SUMMARY OF ARGUMENT

I. The States have a compelling interest in protecting children. That interest is effectuated through non-criminal statutory schemes which require child protection agencies, such as a Department of Social Services (hereafter, "DSS"), to determine whether the child's health or safety is in immediate danger. See pp. 11-13, infra. The expressed and practical purpose of these statutory schemes is protective, not penal. See pp. 14-17 infra.

The most efficient and effective tool that a child protection agency has to investigate cases of suspected child abuse is direct visual observation. Direct observation enables the investigator to determine quickly and accurately whether the physical evidence supports a report of abuse, and whether the child is in immediate danger. After the initial investigation, direct observation also permits effective monitoring of the child's continued well-being. See pp. 18-21, infra.

Child protection agencies depend upon the cooperation, either voluntary or compelled, of the child's custodian in order to undertake a visual observation of the child. See pp. 21-23, infra.

One of the tools that child protection agencies find instrumental to

overcome the resistance of non-cooperative parents is the ultimate threat of a court order to produce the child. It is the collective view of child protective agencies that the very availability of a court order, and the attendant contempt power of the court, contribute to the agencies' ability to persuade most parents to permit access voluntarily. In a small percentage of cases, of course, actual resort to a court order is necessary. See pp. 23-25, infra.

If this Court affirms the judgment below, the States' ability to gain access to children in situations of jeopardy will be impaired, with potentially life-threatening consequences to those children. See pp. 25-27, infra.

II. The Fifth Amendment is not violated by the compelled compliance

with an order to produce the child, because the act of production is not testimonial. Rather, the order merely requires the respondent to become a source of what may become real or physical evidence. See pp. 27-29, infra.

The order to produce the child physically is not the same as an order to disclose his whereabouts. See pp. 30-32, infra. The only arguably testimonial components of the respondent's production of the child would be the acknowledgement that the child is Maurice (the subject of the child protection proceeding) and that the respondent has sufficient control over him tc produce him. But these communications are self-evident "foregone conclusions" which do not rise to the level of testimony within the protection of the Fifth Amendment. See pp. 32-33, infra.

Production of the child is not the equivalent of production of the corpus delicti. In contrast to an order to produce something the possession of which is a crime itself (such as cocaine, or a forged alien registration card), here the order to produce is essentially neutral, and the aim of the order is to assure the child's protection, not to secure evidence. See pp. 33-36, infra.

The Maryland Court of Appeals erred when it concluded that production of the child was testimonial because it may lead to incriminating evidence of child abuse. If production is not testimonial, and therefore is unprotected by the privilege, it does not become testimonial merely because it may lead to incriminating evidence. Compelling production of the child for

examination is no different from requiring an individual to make himself available for a blood alcohol test, or to give a handwriting or voice exemplar, or to stand in a line-up. See pp. 36-37 infra.

Further, the respondent has refused to produce Maurice, but has never asserted that she cannot produce him. Where the act is nontestimonial, punishment for the refusal to act violates no Fifth Amendment right. See pp. 37-38, infra.

III. Assuming arguendo that the production of the child is "testimonial," then this Court should recognize the compelling societal interest in protecting children and tip the balance between the respondent's rights and the child's rights in favor of protecting the child in jeopardy. See pp. 40-42, infra. The statutory

scheme is not directed at a "highly selective group inherently suspect of criminal activities." Rather, it is primarily protective, not penal, in purpose. See pp. 44-47, infra. Thus, the compelling interest in favor of production outweighs whatever limited incriminating effect production of the child might cause for the parent or custodian. See pp. 47-48, infra.

IV. The extension of immunity from prosecution to a recalcitrant parent is not an acceptable solution to the States' need to protect children in this kind of situation. The States should not be required to choose between protecting children and punishing their abusers. Child abusers should not be able to extract immunity in exchange for production: the incentive to hide the child would become too great. See pp. 48-49, infra.

Moreover, the extension of immunity would not guarantee cooperation by the parent or custodian and expeditious access to the child. If granted use immunity, the parent or custodian might refuse to cooperate for fear that a prosecution may follow in any event on the basis of information from independent sources. If granted transactional immunity, the parent or custodian, recognizing she has full immunity, might give incomplete or misleading information. See pp. 49-52, infra.

Immunity, whether use or transactional, does not, as a practical matter, ensure cooperation. There may be other reasons the parent or custodian is not cooperating: fear of reprisal; fear of losing parental rights; or fear of personal disgrace. See pp. 52-54, infra.

Finally, immunity may not always be available under state law and, if available, may be difficult to obtain. In child abuse cases, child protection agencies must be able to move promptly to ensure that children at risk are protected. See pp. 54-57, infra.

For these reasons, the judgment of the Maryland Court of Appeals must be reversed.

ARGUMENT

I. THE STATE'S INTEREST IN PROTECTING CHILDREN FROM ABUSE AND NEGLECT MAKES PHYSICAL ACCESS TO CHILDREN AT RISK A NECESSITY.

Child abuse and neglect is a severe and widespread problem affecting large numbers of children. See generally Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986). Incidents of suspected abuse or neglect are reported

to child protection agencies at annual rates in the tens of thousands.[2/]

2/ For example, during 1987, the Massachusetts Department of Social Services received reports of suspected abuse or neglect of 52,391 children. Reports regarding 68% of these children, or 33,832 children, were "screened in" (see Mass. Regs. Code tit. 110 § 4.21 (1988): reports are "screened out" where the perpetrator is not a caretaker; where the alleged acts of abuse took place too long ago; or where the report has been determined unreliable) and investigated. These investigations resulted in determinations that allegations of abuse or neglect were "substantiated" with respect to 17,399 children, or 51% of the children investigated (see Mass. Regs. Code tit. 110 § 4.03 (13) (1987): substantiated means "to find that there is some credible evidence of a reportable condition." In 1988, the Massachusetts DSS amended the word "substantiated" to "supported," which term means "that the Department has reasonable cause to believe that an incident of abuse or neglect by a caretaker did occur." Mass. Regs. Code tit. 110 § 4.32 (2)). 2477 of the 17,399 children, or 5% of the children reported, required emergency intervention. (Child Abuse/Neglect Statistics, January 1 - December 13, 1987, Prepared by Antone C. Felix III, Massachusetts DSS Research Evaluation and Planning Unit, April 1988, on file with Massachusetts DSS.)

Victims of child abuse or neglect suffer physical, mental, or emotional harm, not infrequently including death. See Darryl H. v. Coler, 801 F.2d at 902 ("[i]n 1982, seventy-one children in Illinois died as a result of child abuse");[3/] see, e.g., DeShaney v. Winnebago County DSS, 109 S.Ct. 998 (1989) (child permanently brain-injured from parental abuse). As this Court observed in Wyman v. James, 400 U.S. 309, 318 (1981), "there is no more worthy object of the public's concern" than the care and protection of children.

3/ According to records of the Massachusetts DSS, in the first five months of fiscal year 1989 as many as fifteen children may have died in the Commonwealth as a result of abuse inflicted by their caretakers. (Monthly Report on Chapter 288 Legislation (D.A. Reporting Bill), November 1988 (on file with Massachusetts DSS).

The compelling State interest in protecting children is primarily effectuated through non-criminal statutory schemes. The statutes governing child protection agencies' efforts reflect their purpose to protect children, and the importance the States ascribe to that purpose. Massachusetts law is illustrative. The stated purpose of the Massachusetts statutory scheme "is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, . . . inability or unfitness. . . to provide care and protection for their children." Mass. Gen. L. ch. 119 § 1.

Mass. Gen. L. ch. 119, § 51A requires certain professionals, and permits any person, to make reports to DSS upon "reasonable cause to believe" that a child is suffering from abuse or neglect. Upon receiving such a report, DSS must determine whether it has reasonable cause to believe that the child's health or safety is in immediate danger. If so, it must commence its investigation within two hours and complete it within twenty-four hours; otherwise, DSS must commence its investigation within two days and complete it within ten days. Mass. Gen. L. ch. 119, § 51B(1). The investigation "shall include a home visit at which the child is viewed, if appropriate." Id. If the investigation discloses "reasonable cause to believe that the removal of the child is necessary to protect him from further abuse or

neglect," DSS may take the child into its custody immediately. Mass. Gen. L. ch. 119, § 51B(3). In other cases, DSS may petition a court for an order placing the child in its custody. Mass. Gen. L. ch. 119, § 24.

To be sure, the States also have an interest in prosecuting as criminal acts at least the more serious forms of child abuse.[4/] However, statistics show that the expressed protective purpose[5/]

4/ For that reason, in Massachusetts for example, DSS must, by statute, refer to prosecutorial authorities certain criminal conduct that comes to its attention. See, e.g., Mass. Gen. L. ch. 119, § 51B(4) (requiring report where child has died; has been sexually assaulted or exploited; or has suffered brain damage, loss or substantial impairment of bodily function or organ, or has been disfigured).

5/ See Mass. Gen. L. ch. 119, § 1, quoted at p. 14, supra.

of the statutory scheme is paramount. For example, in Massachusetts, DSS records indicate that DSS makes reports to district attorneys regarding only about 7.3% of all the children about whom it receives reports of abuse or neglect. Approximately 95% of those cases involve sexual, rather than physical abuse. The proportion of physical abuse cases referred to prosecutors is extremely small. (See note 2, supra.) Thus, as the governing statutes indicate, e.g., Mass. Gen. L. ch. 119, § 1, and as statistics show, the child protection agencies' overriding purpose, and the focus of their efforts, is not to punish parents for past crimes against their children, but to protect the child victims from further harm.

In the course of performing their child protective functions, the child protection agencies have developed substantial expertise in the investigation of suspected child abuse and neglect. From their accumulated experience, these agencies have come to the unanimous view that direct visual observation of the child is a crucial aspect of every child protective investigation.[6/] The implications of the decision of the Maryland Court of Appeals would be to prevent a child protection agency from effectively investigating many serious instances of alleged abuse. This conclusion is consistent with "common sense alone[;] . . . there is no quicker way of knowing whether a child is at grave risk than by an actual examination of the child." Darryl H., 801 F.2d at 899 (quoting District Court finding).

Direct observation of a reportedly abused or neglected child enables the investigator to gauge the child's overall condition and demeanor, to detect bruises or other physical evidence of abuse, and to evaluate the child's nutritional status and hygiene. By these methods, the investigator can determine, as quickly and accurately as possible, whether physical evidence supports the report, and whether the child is in immediate danger. See Id.;

6/ Because of the widely recognized importance of examining the child, some child protection agencies have promulgated regulations requiring that every investigation include examination of the child. For example, the Massachusetts regulations require a visual examination in every case, and, in fact, make it the "first priority" in an emergency case. Mass. Regs. Code tit. 110, § 4.26(i) (1988). See also Child Abuse and Neglect Investigations Handbook of the Illinois Department of Children and Family Services, noted in Darryl H., 801 F.2d. at 896.

Bourne & Newberger, "Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect, 57 B.U.L. Rev. 670, 704 (1977).

The importance of viewing the child does not depend on the nature or severity of the mistreatment reported. As child protection agencies have learned from repeated experience, the most severe instances of child abuse sometimes come to their attention through reports of neglect. Not infrequently, investigators discover an urgent need for intervention only upon observing a reportedly neglected child who exhibits physical evidence indicating life-threatening abuse.

Beyond the investigative stage, once a child is identified as having suffered abuse or neglect, it is obvious that any effort to protect that child from

further harm depends on access to the child. Effective monitoring of the child's continued well-being within the family requires repeated direct observation. Further, when a child must be removed from the family, the removal itself necessarily requires physical access.

On the basis of their experience, child protection agencies have come to the firm and unanimous conclusion not only that their direct access to victims of child abuse or neglect is crucial to the effectiveness of their efforts to protect such children, but also that in most cases they must depend for such access on the cooperation (whether voluntary or compelled) of the child's parents or other custodians. In the agencies' experience, their access to a child almost always depends on the

actions of the child's parent or other custodian. While access may at times be gained at the child's school, day care center, or the like, or through a search of the child's home or some other location where the child is known to be, these methods cannot substitute for parental cooperation. A parent's control over a minor child, particularly in the early years, enables the parent to move the child from the home, to secrete the child away from any place that authorities might search, and thus to thwart efforts to locate the child. This very case vividly illustrates the practical power of a parent determined to hide a child from authorities.

In most cases, parents voluntarily permit the child protection agency access to their children, both during investigations and in connection with

ongoing protective services.[7/] Resistance occurs frequently enough, however, that child protection agencies have adopted tools for responding to it. The agencies' principal tool is persuasion, either by their own personnel, or at times by police. Where necessary, however, the agencies may resort to seeking court orders compelling access. The ultimate availability of such orders, the agencies believe, contributes substantially to their ability to persuade most parents or custodians to permit access voluntarily.

Massachusetts law and practice illustrate a typical child protection

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7/ The protective service agreement between the parties in this case, as quoted at p. 2 of Respondent's Brief in Opposition to the Petition for Writ of Certiorari, is typical of service agreements employed by child protection agencies and approved by courts daily.

agency's approach. By regulation, an investigator faced with a parent's refusal of access to the child may first seek police aid, and may consider invoking a judicial remedy. Mass. Regs. Code tit. 110, §§ 4.26(3), 4.27(3) (1988). Under Mass. Gen. L. ch. 119, § 24, a court receiving a petition for the care and protection of a child "may issue a precept to bring such child before said court." In practice, these precepts are fulfilled by the child's parents or custodians, after being served on them by a police officer or social worker. However, Massachusetts courts have consistently relied on the ultimate possibility of resort to the contempt power to compel compliance with these orders. In the experience of the Massachusetts DSS, the existence of this mechanism to compel access not only

provides a means of last resort, but also tends to induce voluntary cooperation.

If affirmed, the decision of the Maryland Court of Appeals would significantly impair the States' ability to protect children. Precisely because acts constituting child abuse or neglect are also frequently criminal acts, the analysis employed by the Court of Appeals of Maryland has dramatic negative implications for the protection of children.

In any case of abuse or neglect, the child's physical condition may supply evidence of crime, as well as evidence of the child's need for protection. Thus, under the Maryland Court's analysis, any parent or custodian who has committed -- or who might be suspected of -- a crime involving child abuse or neglect has a constitutional

right to refuse to produce the child for examination, even in the absence of any criminal investigation or prosecution. That right, as defined by the Maryland Court, would prevail over the child's need for protection, no matter how urgent, and would constitute an absolute defense to non-compliance with a court order requiring production of the child.

Under the Maryland Court's ruling, child protection agencies would be deprived of any means to compel access to children in need of protection, as well as of a significant tool in their efforts to induce voluntary cooperation. Amici believe that that result would significantly impair the agencies' ability to protect large numbers of children in situations of severe jeopardy, with potentially life-threatening consequences to those

children. That result is legally and morally unacceptable.

II. THE RESPONDENT MAY PROPERLY BE HELD IN CONTEMPT FOR FAILURE TO PRODUCE THE CHILD BECAUSE THE ACT OF PRODUCING THE CHILD IS NOT A TESTIMONIAL COMMUNICATION.

The privilege against self-incrimination is an exception to the rule that citizens have a social obligation to come forward with evidence. Miranda v. Arizona, 384 U.S. 436, 477-78 (1966); see also Branzburg v. Hayes, 408 U.S. 665, 688 (1972). Unless the Fifth Amendment privilege applies, the respondent here "no less than any other citizen is obliged to assist the authorities." Roberts v. United States, 445 U.S. 552, 558 (1980); see also United States v. Washington, 431 U.S. 181, 189 (1977).

The Fifth Amendment's mandate that no person "shall be compelled in any

criminal case to be a witness against himself" protects only against compelled,[8/] testimonial communications that are incriminating. Fisher v. United States, 425 U.S. 391, 409 (1976); see also Doe v. United States, ("Doe II") 108 S.Ct. 2341, 2346 (1988).

The Fifth Amendment is not violated by the order to produce the child, because the act of producing Maurice would not be testimonial; by producing him, the respondent would not be a witness, but only a source of "real or physical evidence." See Schmerber v. California, 384 U.S. 757, 764 (1966). An order to produce Maurice is analogous to an order to submit to a blood test, Schmerber, 384 U.S. at 764-65; to stand

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8/ There is no question that the contempt judgment below and the commitment imposed thereon constitutes compulsion. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

in a line-up and speak words used by a robber, United States v. Wade, 388 U.S. 218, 222-23 (1967); to provide a handwriting exemplar, see Gilbert v. California, 388 U.S. 263, 265-66 (1967); to provide a voice exemplar, United States v. Dionisio, 410 U.S. 1, 5-7 (1973); to provide items of clothing, Warden v. Hayden, 387 U.S. 294, 302 (1967); to wear certain clothing, Holt v. United States, 218 U.S. 245, 253 (1910); to surrender a passport, United States v. Friedman, 593 F.2d 109, 118 (9th Cir. 1979); and to produce business records, United States v. Doe, 465 U.S. 605, 612 (1984) ("Doe I"). Compelled performance of these acts does not violate the Fifth Amendment because none of these acts requires the subject of the compulsion order "to speak his guilt." Wade, 388 U.S. at 222-23.

Physical production of the child must be distinguished from disclosure of his whereabouts. Compelling his production is like being forced to surrender a key to a strong box containing possibly incriminating documents but is unlike being "compelled to reveal the combination to [a] wall safe. (citation omitted)." Doe II, 108 S. Ct. at 2347 n.9. This "bifurcated approach," New York v. Quarles, 467 U.S. 649, 668 (1984) (O'Connor, J., concurring) to real and testimonial evidence is well established.[9/] Indeed, it has been

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9/ In Schmerber, 384 U.S. at 765 n.9, the Court distinguished between the results of blood tests themselves (the physical evidence) and "any testimonial products of administering the test -- products which would fall within the privilege." (emphasis original). See also Wade, 388 U.S. at 223 (Court distinguishing between the line-up identification procedure itself and what was said at the procedure); Michigan v. Tucker, 417 U.S. 433, 445 (1974) (Court

(footnote continued)

suggested that physical evidence such as a gun, discovered as a result of an improperly "compelled" (in the Miranda[10/] sense) testimonial

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(footnote continued)

distinguishing between the testimony of an alibi witness identified by the defendant before defendant had received complete Miranda warnings, and the defendant's own statements); Wilson v. United States, 221 U.S. 361, 377 (1911) (Court distinguishing between corporate records and oral testimony from defendant); Doe II, 108 S.Ct. at 2347 n.9 and at 2348 n.10 ("the Schmerber line of cases does not draw a distinction between unprotected evidence sought for its physical characteristics and protected evidence sought for its content. Rather, the court distinguished between the suspect's being compelled himself to serve as evidence and the suspects's being compelled to disclose or communicate information or facts that might serve or lead to incriminating evidence.")

10/ Miranda v. Arizona, 384 U.S. 436 (1966).

response (as to the location and ownership of the gun), is nonetheless, and as distinct from the testimonial aspects of the response, admissible. Quarles, 467 U.S. at 665, 667 (O'Connor, J., concurring); but see Commonwealth v. Hughes, 380 Mass. 583, 592, 404 N.E.2d 1239, 1244, cert. denied, 449 U.S. 900 (1980). Under this analytically sound approach, compliance with the order to produce Maurice would not be testimonial.

The only "contents of [her] own mind," Curcio v. United States, 354 U.S. 118, 128 (1957), that the respondent arguably might be compelled to communicate by complying with the order to produce Maurice would be the acknowledgement that the child is Maurice and that the respondent has sufficient control over him to produce him. See Doe II, 108 S.Ct. at 2347; Braswell v. United

States, 108 S.Ct. 2284, 2288 (1988); Doe I, 465 U.S. at 614 n.13. However, because respondent is Maurice's parent, and because she has legal custody of him (which is already the subject of state involvement)[11/] these arguably implicit testimonial communications are self-evident "foregone conclusions" and therefore have "minimal testimonial significance," Fisher, 425 U.S. at 411-12, which do not rise to the level of "testimony" within the protection of the Fifth Amendment. Id. at 410-13; see also United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir. 1977), and cases cited.

The Maryland Court of Appeals erred in concluding that production of the child was "testimonial" because it would amount to production of the "corpus

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11/ In re Maurice M., 314 Md. 391, 550 A.2d 1135, 1136 (1988).

delicti." In re Maurice M., 314 Md. 391, 550 A.2d 1135, 1141 (1988). Contrary to the Court's suggestion, the order to produce the child was not an order to produce "the crime itself." United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970) (forged alien registration receipt card) aff'd, 404 U.S. 293 (1971); cf. State v. Dennis, 16 Wash. App. 417, 558 P.2d 297 (1976) (cocaine); State v. Alexander, 281 N.W.2d 349 (Minn. 1979) (obscene film); Hughes, 380 Mass. at 592, 404 N.E.2d at 1244 (defendant licensed to own firearm could not be compelled to produce it for ballistics test).[12/]

12/ In fact, in Campos-Serrano, the Court distinguished between the first, non-criminal, immigration inquiry whether the defendant was lawfully in the country, which inquiry did not violate the defendant's Fifth Amendment privilege, and the second inquiry for "the crime itself," the forged cards that had previously been examined.

Rather, the order to produce the child was an essentially neutral request. Cf. United States v. Sullivan, 274 U.S. 259, 263-64 (1927) (requirement to file income tax return is neutral on its face); California v. Byers, 402 U.S. 424, 430-31 (1971) (requirement to report automobile accident is neutral on its face). The primary aim of the order to produce was not to secure evidence for a criminal prosecution[13/] but to assure protection of a child pursuant to an order that required the respondent not to abuse the child and to cooperate with the petitioner Department of Social

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13/ cf. Hughes, 380 Mass. at 591-92, 404 N.E.2d at 1244 (order to produce gun for ballistics test); Albertson v. SACB, 382 U.S. 70, 79 (1965) (statute requiring registration as member of Communist Party); Haynes v. United States, 390 U.S. 85, 96-97 (1968) (statute requiring registration of firearms); Leary v. United States, 395 U.S. 6, 18 (1969) (statute imposing tax on transfers of marijuana).

Services, In re Maurice M., 550 A.2d at 1136-37. Cf. Byers, 402 U.S. at 432 (disclosure of name and address of driver involved in accident is an essentially neutral act); Shapiro v. United States, 335 U.S. 1, 32 (1948) (defendant's records used to prosecute him for violation of Price Control Act), reh'g denied, 335 U.S. 836 (1948); Sullivan, 274 U.S. at 263-64 (filing of tax returns required even though it might reveal violations of Prohibition Act; it would "be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime"). Thus, the incidental possibility of self-incrimination is not enough to excuse non-compliance with the order to produce.

The Maryland Court of Appeals also erred in concluding that the production of the child was testimonial because it might reveal that Maurice has been subject to criminal abuse or is dead. See In re Maurice M., 550 A.2d at 1141. Because the compelled production is "not testimonial and for that reason not protected by the privilege, it cannot become so because it [may] lead to incriminating evidence." Doe II, 108 S.Ct. at 2346 n.6, quoting In re Grand Jury Subpoena, 826 F.2d 1166, 1172 n.2 (2d Cir. 1987) (concurring opinion), cert. denied sub nom. Coe v. United States, 108 S.Ct. 2870.

That an examination of Maurice might yield incriminating evidence of child abuse does not transform the nontestimonial quality of the act of production into a testimonial

communication. See Doe II, 108 S.Ct. at 2346 n.6. Respondent's making Maurice available for examination is no different from an individual's making himself available for a blood-alcohol test. The government would still be required to locate evidence of criminality "by the independent labor of its officers." Doe II, 108 S.Ct. at 2350, quoting Estelle v. Smith, 451 U.S. 454, 462 (1981).

The record indicates that the respondent has never asserted that she would not be able to produce Maurice. To the contrary, she insisted first that Maurice was with an aunt (unidentified) and then that he was with her sister at an address in Texas. In re Maurice M., 550 A.2d at 1137. In essence, the respondent has refused to act. Where the act is nontestimonial, punishment for the refusal to act violates no Fifth Amendment right. See Deering v. Brown,

839 F.2d 539, 541-42 (9th Cir. 1988) (refusal to take blood alcohol test not testimonial); see also South Dakota v. Neville, 459 U.S. 553, 560-61 n.11 (1983) (Court recognizing that the view that refusal to take blood alcohol test is not testimonial has force, but declining to rest its decision that the refusal is admissible on that basis); United States v. Toussie, 410 F.2d 1156, 1160 (2d Cir. 1969) (defendant's privilege against self-incrimination was not violated by his failure to register for selective service on ground he could not register without incriminating himself; defendant's inaction did not give rise to threat of punishment beyond what he already risked), rev'd on other grounds, 397 U.S. 112 (1970); see also Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976) (prison disciplinary board may draw adverse inference from silence); Jenkins

v. Anderson, 447 U.S. 231, 235-36 (1980) (defendant may be impeached with silence).

For the foregoing reasons, the Court of Maryland erred when it concluded that production of the child was testimonial and that the juvenile court could not compel, under penalty of contempt, the respondent to produce him.

III. ASSUMING ARGUENDO THAT PRODUCTION OF THE CHILD IS "TESTIMONIAL," THEN, ON BALANCE, PRODUCTION MAY NONETHELESS BE LAWFULLY COMPELLED BECAUSE THE PUBLIC INTEREST IN PROTECTING CHILDREN IS PARAMOUNT.

A conclusion by this Court that compliance with the order to produce the child would be testimonial and would implicate the respondent's Fifth Amendment right should not necessarily end the Court's inquiry. This Court has long recognized that societal interests must be taken into consideration when determining the proper reach of the

privilege against self-incrimination. See, e.g., Byers, 402 U.S. at 427. Indeed, even in the purely criminal context, this Court has recognized that the "scope of the privilege [does not coincide] with the complex of values it helps to protect," Schmerber, 384 U.S. at 762. Similarly, in refusing to extend the scope of the privilege to corporate record keepers, this Court has recognized that extending the privilege may have a negative impact on the Government's efforts to prosecute crime. See Braswell, 108 S.Ct. at 2294. As this Court has stated:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the

> individual claim to constitutional protections on the other; neither interest can be treated lightly.

Byers, 402 U.S. at 27.

Here, where the primary purpose of the statutory scheme that would permit the taking of a child into custody or an order to produce the child[14/] is to protect children, the balance tips away from the respondent's Fifth Amendment right in favor of protecting the child in jeopardy. Cf. United States v. Vaught, 434 F.2d 124 (9th Cir. 1970) (requiring

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14/ The Maryland trial court had the statutory power of contempt to compel the unwilling custodian to produce the child before the court. See Md. Courts and Judicial Proceedings Code Ann. § 3-814(c) ("If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.")

reporting of amphetamines at customs point), cert. denied, 401 U.S. 976 (1971); Wynn v. United States, 422 F.2d 1245 (9th Cir. 1970) (requiring disclosure of marijuana smuggled into United States); United States v. Flores, 753 F.2d 1499 (9th Cir. 1985) (requiring reporting of intent to ship firearms). See also Quarles, 467 U.S. at 665-66 ("the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"); United States v. Webb, 755 F.2d 382, 392 n.14 (5th Cir. 1985) (failure to give Miranda warnings no bar to admissibility of statements where negotiators' primary purpose was to prevent defendant's threatened suicide), reh'g denied en banc, 762 F.2d 1004 (5th Cir. 1985).

Where the primary purpose of a statutory scheme is not to facilitate criminal convictions, but rather is neutral on its face and is not directed at a "highly selective group inherently suspect of criminal activities," Byers, 402 U.S. at 430, the balance of interest tips in favor of requiring "disclosure." Id.; cf. Shapiro, 335 U.S. at 33; Sullivan, 274 U.S. at 263-64; United States v. Des Jardins, 747 F.2d 499, 508-09 (9th Cir. 1984); United States v. Grotke, 702 F.2d 49 (2d Cir. 1983); United States v. Carlson, 617 F.2d 518 (9th Cir.), cert. denied, 449 U.S. 1010 (1980).

The statutory scheme in this case, which permits a child to be taken into custody and the court to request his production, see n. 14, supra, is not directed at a "highly selective group

inherently suspect of criminal activities." Byers, 402 U.S. at 430. Although the request to produce the child is directed at "a parent, guardian or custodian"[15/] of a child who is the subject of investigation, [16/] this group is neither "highly selective" nor "inherently suspect of criminal activity." Because the group encompasses all who might possibly have custody of a child, see Md. Code Ann. § 3-801, it would be untenable to suggest that it is "highly selective." Further, it is not a crime, in and of itself, to be the parent, guardian, or custodian of a child who has been abused. While the perpetrator of abuse may indeed be

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15/ Md. Code Ann. § 3-814(c).

16/ Child protection schemes generally contain a provision compelling production of the subject child. See, e.g., Mass. Gen. L. ch. 119, § 24; Cal. Welf. & Inst. Code §338 (West). See pp. 24-25, supra.

one of these individuals, he may not necessarily be so: the child may have suffered abuse at the hand of some other caretaker, such as a teacher, relative, or other household member.

Moreover, a statutory scheme compelling the production of a child whose safety is in question is not "intended to facilitate criminal convictions," Byers, 402 U.S. at 430, but rather constitutes one component of an overall scheme designed to protect children who may be the subjects of abuse and neglect. See pp. 15-16, supra. That these laws require a child protection agency to investigate suspected cases of abuse and provide support services where necessary, illustrates that the laws are designed to promote the welfare of children. The possibility that a child protection agency's investigatory efforts

might provide "a link in the chain of evidence," Byers, 402 U.S. at 432, quoting Hoffman v. United States, 341 U.S. 479, 486 (1951), leading to the prosecution and conviction of an individual for child abuse does not work to transform the statutory scheme from a protective to a criminal one. Cf. Marchetti v. United States, 390 U.S. 39, 56-57 (1968) (Court striking down "ingeniously drawn legislation," the aim of which was to obtain evidence from persons involved in criminal activity for use in their prosecution).

This Court has recognized that child abuse is especially difficult to detect. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987). Visual observation of a child is a vital tool with which to ascertain whether the child has been the victim of abuse. See pp. 18-21, supra. Here, the

compelling interest in favor of production decisively outweighs whatever limited incriminating effect production of the child might cause for the custodian. A holding that the Fifth Amendment privilege allows a parent or custodian to conceal from a child protection agency the physical condition of a child would all but render it impossible for such agencies to fulfill their statutory mandates. In that event, many cases of abuse would go undetected and many children would be left unprotected.

IV. THE EXTENSION OF IMMUNITY TO A RECALCITRANT PARENT OR CUSTODIAN IS NOT A SATISFACTORY TOOL TO PROTECT CHILDREN FROM ABUSE AND NEGLECT.

Assuming for purposes of argument that production of a child is testimonial, the extension of immunity

from prosecution, pursuant to which the State might be able to compel production of the child,[17/] is not a solution to the Fifth Amendment question raised in this case and it is not an appropriate response to the States' need to protect children from abuse.

The States should not be required to choose between protecting children and punishing those who abuse them. Moreover, child abusers should not be able to avoid prosecution by refusing to produce, until immunity is extracted, a child who is in jeopardy; otherwise, the incentive to hide the child would become too powerful.

Further, the extension of immunity, if available, would not guarantee

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17/ See Kastigar v. United States, 406 U.S. 441, 458 (1980), reh'g denied, 408 U.S. 931 (1981).

cooperation by the parent or custodian or expeditious access to a child at risk. A grant of immunity need only be "as broad as . . . the privilege against self-incrimination, Murphy v. Waterfront Comm'n, 378 U.S. 52, 107 (1964) (White, J., concurring)," motion denied, 379 U.S. 898 (1964); Doe I, 465 U.S. at 617 n.17. Use immunity, whereby the witness is protected from the use in any criminal proceedings against him of his testimony or other information compelled from him under oath, is constitutionally sufficient. Kastigar v. United States, 406 U.S. 441, 449, 453 (1972) reh'g denied, 408 U.S. 931 (1972).[18/] Under a use immunity scheme, the State

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18/ Some States provide only for use immunity, although a majority provide for the broader transactional immunity. See National Ass'n of Attorneys General, Organized Crime Control Legislation (1974 and 1979 Supp.).

may still prosecute the immunized witness if it can show that it has an "independent, legitimate source for the disputed evidence." Murphy, 378 U.S. at 79 n.18. Thus, a parent or custodian given use immunity might refuse to cooperate for fear that a prosecution may follow in any event on the basis of the information from independent sources. Thus, she may be willing to bear the sanction for refusing to produce or disclose the whereabouts of the child rather than risk harsher penalties following a criminal prosecution. See Piccirillo v. New York, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting); Tierney v. United States, 409 U.S. 1232, 1233-34 (1972); In the Matter of Vance A., 105 Misc.2d 254, 432 N.Y.S.2d 137, 141 n.7 (1980). See also LaFave and Israel, Criminal Procedure, Vol. 1, §8.11 (1984).

On the other hand, under the broader transactional immunity scheme, whereby the witness is immunized from prosecution for the offense concerning which she testifies regardless of the source of the evidence, see Kastigar, 406 U.S. at 449-50,[19/] a parent or custodian given immunity might also refuse to cooperate: the custodian may give incomplete or unhelpful information, recognizing that limited information will gain her full immunity from prosecution. See LaFave, supra. This will not aid a child at risk; it will not ensure that the child is found or that he will receive the immediate medical, psychological, or social care he needs.

19/ In Massachusetts, for example, transactional immunity is mandated as a matter of state constitutional law. Mass. Gen. L. ch. 233, § 20G; Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982).

Further, immunity extended under either system would not guarantee expeditious access to a child who may have been hidden by his parent or custodian. There could be many reasons in addition to fear of criminal prosecution which could motivate the parent or custodian not to produce the child or disclose his whereabouts, including: fear of termination of parental rights or custody, see Lassiter v. Department of Social Services, 452 U.S. 18, 27 n.3, 31 (1981) (Court recognizing that termination of parental rights is commonly based on alleged criminal activity), reh'g denied, 453 U.S. 927 (1981), Ullman v. United States, 350 U.S. 422, 430-31 (1956) (immunized testimony admissible in civil proceedings), reh'g denied, 351 U.S. 928 (1956), and In the Matter of Vance A.,

432 N.Y.S.2d at 141 n.7; fear of personal disgrace, Smith v. United States, 337 U.S. 137, 147 (1949); or fear of reprisal by another person who may be a co-perpetrator, see Piemonte v. United States, 367 U.S. 556, 558-59 (1961). The extension of immunity will not resolve these issues.[20/]

Immunity is not expeditiously or easily obtained. In Massachusetts, for example, a strict and time-consuming statutory procedure must be followed. Petition of the District Attorney for the Plymouth District, 391 Mass. 723, 726-27, 464 N.E.2d 62, 64-65 (1984), aff'd,

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20/ It should also be noted that immunity may not always be available as a matter of state law. For example, child abuse or neglect per se is not a crime in Massachusetts. Thus child abuse per se is not one of the listed crimes for which witness immunity is available in Massachusetts, Mass. Gen. L. ch. 233, §20D.

Palaza v. Superior Court, 393 Mass. 1001, 469 N.E.2d 60 (1984). In order for a witness to receive immunity, a district attorney or the Attorney General must convene a grand jury, initiate a grand jury proceeding and then call the witness before the grand jury. Mass. Gen. L. ch. 233, § 20E. Absent an active criminal investigation, the prosecutor may not call the witness to the grand jury merely to determine if she will invoke the Fifth Amendment. Petition of the District Attorney, 391 Mass. at 727, 464 N.E.2d at 65. After the witness invokes her Fifth Amendment rights, the district attorney or Attorney General must apply to a Single Justice of the Supreme Judicial Court for a grant of immunity. Mass. Gen. L. ch. 233, § 20E. If the Single Justice denies the petition for immunity,

that decision is unreviewable. See Petition of the District Attorney for the Northern District, 399 Mass. 1001, 502 N.E.2d 511 (1987).

As applied to a case like this one, the statutory immunity scheme set forth, for example, in Mass. Gen. L. ch. 233, §20C-20I would effectively transform an expeditious civil proceeding designed to locate and protect a child in danger of imminent physical injury or death into a cumbersome and time-consuming criminal proceeding. Such a result is unacceptable. Child protection agencies must be able to move expeditiously because "prompt conclusion of child abuse proceedings is essential to child welfare." In the Matter of Vance A., 432 N.Y.S.2d at 143; see also Darryl H., 801 F.2d at 899.

For the foregoing reasons, the availability of immunity is not a satisfactory answer to the Fifth Amendment question raised in this case.

CONCLUSION

In order to preserve the ability of the states to protect children in jeopardy from abuse or neglect, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Nos. 88-6651, 88-1182

(7)

Supreme Court, U.S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

MAURICE M.,
Petitioner,

vs.

JACQUELINE BOUKNIGHT,
Respondent.

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

vs.

JACQUELINE BOUKNIGHT,
Respondent.

On Writ of Certiorari
To the Court of Appeals of Maryland

BRIEF OF AMICUS CURIAE CHARLES M. IN SUPPORT OF PETITIONERS MAURICE M. AND THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES

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Nos. 88-6651, 88-1182

In The

Supreme Court of the United States

October Term, 1988

Maurice M.,

Petitioner,

v.

Jacqueline Bouknight,

Respondent.

Baltimore City Department of Social Services,

Petitioner,

v.

Jacqueline Bouknight,

Respondent.

Brief of Amicus Curiae

INTEREST OF AMICUS CURIAE

Amicus Charles M. files this amicus curiae brief in support of Petitioners

Maurice M. and the Baltimore City Department of Social Services. Charles is a ten-year-old boy who was physically abused by his parent. As a result of that abuse suffered at the hands of his parent, Charles was placed under the jurisdiction of the San Francisco Juvenile Court. He remains a ward of that Court and is subject to its continuing jurisdiction.

Since 1970 the National Center for Youth Law has represented the interests of children in several landmark cases decided by the United States Supreme court such as Breed v. Jones, 421 U.S. 519 (1975); Parham v. J.R., 442 U.S. 584 (1979); and Lassiter v. Department of Social Services, 452 U.S. 18 (1981). During the past two decades, NCYL staff have developed experience in an extensive range of issues affecting the legal rights of children. NCYL is part of the national system of legal services for the poor. It provides consultation to and

serves as a resource center for private attorneys, legal services offices, public interest attorneys, and other advocates for children throughout the country who work on issues related to child welfare, juvenile justice, public benefits for children, child and adolescent health, homeless children, and housing discrimination against families with children.

QUESTIONS PRESENTED

I. DOES A COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED INFANT SON COMPEL INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION?*

II. EVEN IF THE FIFTH AMENDMENT PRIVILEGE IS IMPLICATED BY A COURT ORDER TO PRODUCE A CHILD, IS THE PRIVILEGE OVERCOME BY THE IMPORTANT SOCIETAL INTEREST IN PROTECTING CHILDREN IN JEOPARDY OF SERIOUS INJURY?

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* Amicus addresses only the second question certified for consideration by the Court. In so doing, amicus expresses no opinion with regard to the merits of the first question.

STATEMENT OF THE CASE

Amicus adopts and incorporates by reference here the Statement of the. Case contained in the brief of Petitioner, Maurice M.

SUMMARY OF ARGUMENT

When no less intrusive alternative for protection of the child exists, the state's interest in the safety of an abused child who is a ward of the juvenile court may be of sufficient importance to compel the parent to produce the child over her objection that to do so violates her Fifth Amendment rights to be free from self incrimination.

Preservation of the health and welfare of children is an urgent and compelling interest of the state. The state has an even stronger interest in protecting children whose previous abuse by the parent has been confirmed and the child placed under the jurisdiction of the juvenile court. In a series of decisions of this Court, a balancing process has been applied in resolving conflicts which arise between the constitutional rights of a parent and the

state's interest in child protection. These cases when read in conjunction with subsequent decisions approving or suggesting that some infringement upon a defendant's Sixth Amendment right is permissible in order to advance the state's goal of protecting abused children. Taken together, those decisions form the basis for applying a similar balancing test when the conflict arises between Fifth Amendment rights of the parent and the state's interest in protecting children within the jurisdiction of the juvenile court from harm by that parent.

In resolving whether or not the state's interest is sufficient to override the Fifth Amendment rights of the parent, the court must weigh the particular facts and circumstances of the case, including the availability of less intrusive alternatives adequate to protect the child suspected of being in danger. The circumstances of this

case argue most compellingly for the balance of interests being struck in favor of the state and the child. Previous abuse of the child, the seriousness and multiplicity of past injuries, his very young age, the mother's prior admissions regarding her inadequate care of the child, her submission to the continuing jurisdiction of the court, uncontroverted evidence of her mental health and its adverse impact on her ability to protect the child, and her intentional misleading of the court in its search for her infant son all suggest that the child whom the court seeks to be produced is in a real and present danger. In the absence of a less intrusive means of achieving the state's compelling goal here, the abrogation of any Fifth Amendment right the mother may have is warranted.

While the circumstances of this case warrant the abridgment of the mother's constitutional right, amicus urges the Court

to narrow explicitly the application of this result. Outside of compelling a parent to bring a child to court or to disclose his whereabouts, there are other circumstances in dependency and abuse cases which implicate the Fifth Amendment rights of parents. Should the Court hold that the state's interest is sufficiently compelling to override that constitutional right here, such a holding should be confined to the particular facts of this case.

ARGUMENT

I. WHEN THERE IS NO LESS RESTRICTIVE ALTERNATIVE FOR PROTECTING THE CHILD, THE STATE'S COMPELLING INTEREST IN THE PROTECTION OF CHILDREN WITHIN THE JURISDICTION OF THE JUVENILE COURT MAY TAKE PRECEDENCE OVER THE CONFLICTING FIFTH AMENDMENT RIGHTS OF A PARENT WHICH ARISE IN JUVENILE COURT CHILD PROTECTIVE PROCEEDINGS.

The state's protection of the health and safety of children long has been recognized as a compelling state interest. Pennsylvania v. Ritchie ___ U.S. ___, 107 S.Ct. 989, 1003 (1987). Prince v. Massachusetts 321 U.S. 158 (1944). This Court has observed that "[t]here is no more worthy object of the public's concern" than the protection and welfare of children, Wyman v. James 400 U.S. 309, 318 (1971):

that the state has an "urgent interest" in their welfare, Lassiter v. Department of Social Services 452 U.S. 18, 27 (1981); and that "[t]he State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." Palmore v. Sidotti, 466 U.S. 429, 433 (1984).

The opinions of this Court also have repeatedly affirmed the fundamental nature of a parent's right to the care, custody and management of their children. Santosky v. Kramer, 455 U.S. 745 (1982); Wisconsin v. Yoder 406 U.S. 205 (1972); Pierce v. Society of Sisters 268 U.S. 510 (1925). It has been described as "an interest far more precious than any property right" Santosky, 455 U.S. at 758. Furthermore, "[t]he fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or

have lost temporary custody of their child to the State", Santosky 455 U.S. at 753.

Inevitably, these two interests have come into conflict. In the resolution of these conflicts, no rule of absolutes has prevailed. Instead, this Court has engaged in a balancing of interests. In that balancing sometimes the parents' interests have been found to outweigh those of the state, Pierce v. Society of Sisters 268 U.S. 510 (1925); Wisconsin v. Yoder 406 U.S. 208 (1972), while in other circumstances the parents' rights, though of constitutional stature, have been compelled to give way to those weightier interests of the state. Prince v. Massachusetts 321 U.S.158 (1944); Jehovah's Witnesses v. King County Hospital, 278 F.Supp. 488 (W.D. Wash. 1967) aff'd mem., 390 U.S. 598 reh. denied 391 U.S. 961 (1967). Although the results of this balancing of interests have differed, the viability of the balancing test itself has

been maintained. Even outside of the parent-child relationship, the Court has applied a balancing process when the interests of the state in child protection have come into conflict with the constitutional rights of a criminal defendant.

In the case before the Court, the Maryland Court of Appeals held that the application of a balancing test was not appropriate when the state's interest in protecting the victims of child abuse ran up against the Fifth Amendment right of the parent to be free from self-incrimination. This holding fails to acknowledge the weight properly afforded the particular state interest at issue here and ignores the precedents of this Court approving and applying a balancing of interests test. Even when the actions of the parent are predicated upon provisions of the Bill of Rights explicitly incorporated into the Due Process Clause of the Fourteenth Amendment

and thus made applicable to the states, a balancing process is appropriate.

A. THE STATE'S INTEREST IN THE PROTECTION OF ABUSED AND NEGLECTED CHILDREN IS A COMPELLING AND URGENT ONE.

In 1986 there were 2,086,000 documented reports of child abuse and neglect in the United States.[1] This figure represents an estimated 212 percent increase over the number of reports received in 1976.[2] Between forty and forty-two percent of the reports received in 1986 were substantiated after official

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[1] American Humane Association, **Highlights of Official Child Neglect and Abuse Reporting 1986**, at 6, 1988. This is the latest year for which national statistics are available.

[2] American Humane Association, **Responding to Child Neglect and Abuse**, at 2, 1988.

investigations.[3]

For that same year, twenty states, representing fifty percent of the nations's child population, reported 556 children died as the result of child abuse or neglect.[4] This figure is undoubtedly an underestimate of the actual number of fatalities since it includes only those children known to child protective services agencies before their death. In 76.4% of these deaths, the perpetrator was a parent, stepparent, or foster parent. Fifty-three percent of the victims were male while 46.3% were female.[5] From 1985 to 1986 national reports of child fatalities rose twenty-three percent, double the rate of increase the previous year.[6]

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[3] American Humane Association, Highlights, supra at 11.

[4] Id., at 24.

[5] Id., at 24, Table IX.

[6] American Humane Association, **Protecting Children** 17 (Summer 1988).

These official statistics represent only the tip of the iceberg of the problem. They include only those cases in which the child came to public attention through an official report of child abuse or neglect turned in to a state or local child protection agency.[7] Studies have shown that only one third of actual child abuse cases known to professionals get officially reported.[8]

Many of these child victims are, like petitioner Maurice, children who are too young to speak up for themselves; they are unable to flee the dangerous environment in which they live without the intervention of others. Nationwide, approximately forty-three percent of abused children are between

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[7] R. Gelles and M. Strauss, **Intimate Violence: The Definitive Study of the Causes and Consequences of Abuse in the American Family,** pp.72-74 1988.

[8] American Humane Association, **Responding to Child Neglect and Abuse**, at 2, 1988.

birth and five years old.[9] It is these young victims for whom the risk is greatest. The average age of the children who were reported as dying from injuries as the result of abuse or neglect in 1986 was 2.8 years.[10]

With passage of the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. 5101 et seq., Congress created the first of several federal programs specifically designed to combat child abuse and neglect. In more recently providing for the establishment of a National Commission on Child and Youth Deaths, Congress found that:

> (1) even by conservative estimates, during 1985 and 1986, child abuse fatalities in this country increased by 23 percent; (2) the average age of children

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[9] American Humane Association, **Highlights,** supra., p. 21, Table V.

[10] Id. at 24. Maurice, who is the subject of this case, is just about this age.

> who die from abuse and neglect is two years old..

Pub. L. 100-294 Section 106. In 1984, Congress authorized Federal challenge grants to encourage states to establish and maintain trust funds for the support of child abuse and neglect prevention. Among the findings cited in support of this legislation were:

> (1) disturbing increases have occurred in recent years in the number of young Americans who are abused;
> (2) Many children who run away from home, who fall prey to pornography and prostitution, who suffer from a dependency on alcohol and drugs, and who become juvenile offenders, have been victims of child abuse;
> (3)research has shown that abuse tends to repeat itself, and many times parents who abuse their children were once victims themselves; ...
> (7) The Nation cannot afford to ignore the importance of preventing child abuse.

The importance of the public interest at issue in this particular case is also evidenced by the numerous state statutes

enacted for the benefit of children at risk of abuse and neglect.[11] Pennsylvania v. Ritchie ___ U.S. ___, 107 S.Ct. 989, 1003 n.17 (1987). Juvenile or family court acts establishing procedures for the protection of these children exist in all states and the District of Columbia. Comprehensive legislation mandating the reporting of child abuse has been in force in all states since 1968. Each year numerous revisions in both the civil and criminal laws addressing the problem are introduced in an attempt to increase child protection. From 1983 through the 1987 sessions of state legislatures, the number of bills concerning child abuse and neglect enacted increased 334 percent, from

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[11] See National Center on Child Abuse and Neglect, **State Statutes Related to Child Abuse and Neglect: 1986 and State Statutes Related to Child Abuse and Neglect: 1987 Update** (1988).

64 bills in 1983 to 278 in 1987.[12] These bills, among other things, have modified the definition of maltreatment which warrant state intervention, changed procedures in the juvenile and family courts, expanded the list of mandatory reporters, and provided for the protection of child witnesses.[13]

The urgency and importance of the child abuse problem is also reflected by the activities of the judiciary. Each year more than 3000 juvenile and family courts including more than 7000 judges and referees, hear 390,000 child abuse and neglect cases and review some 600,000 protective service orders like that which

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[12] National Conference of State Legislatures, **Legislative Summaries on Children, Youth, and Family Issues**, 1983-1987 (1988).

[13] National Conference of State Legislatures, **1987 State Legislative Summary: Children Youth and Family Issues** (1987).

was entered in petitioner's case.[14] These judges who daily see the results of neglect and abuse and who appreciate the urgency of the crisis have brought their collective experience together to develop recommendations for improving the welfare of children. During 1985 and 1986 a committee of presiding juvenile and family court judges from the 40 largest urban courts in the country met to discuss "the youth who now comprise the largest and fastest growing portion of most juvenile and family court caseloads"--i.e. abused and neglected children.[15] They emphasized the important societal interest in these children as "[c]hildren who are deprived of their

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[14] National Council of Juvenile and Family Court Judges, **Judicial Authority and Responsibility: 18 Recommendations on Issues in Delinquency and Abuse/Neglect Dispositions 1 (January, 1989).**

[15] Metropolitan Judges Committee, National Council of Juvenile and Family Court Judges, **Deprived Children: A Judicial Response** (1986).

essential needs not only are handicapped in their pursuit of happiness, they are a prime source of future crime and delinquency, and of future abuse of their own children."[16]

In introducing his Child Abuse Prevention Initiative this year Pennsylvania Governor Casey declared: "We feed our children, we put clothes on their bodies, but first and foremost we must make them safe from violence and neglect."[17] Governor Casey's statement is just one indication of the executive branch's appreciation for the urgency of the child abuse problem in our society. Its importance to the state is also reflected in other actions by executive branch members. For example, in 1986, the Attorney General of California sponsored a bill calling for the establishment of a Child Victim Witness Judicial Advisory

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[16] Id. at 5.

[17] State of the Commonwealth Address, January 24, 1989.

Committee. In 1987, the Governor of Alabama appointed a Special Commission of Child Welfare Services to study the crisis surrounding children at risk of abuse and neglect in the state.

Official statistics suggest the magnitude of the child abuse and neglect problem confronting the states. The responses to the problem by the states and Congress, confirm the importance of child protection as a legitimate, compelling interest of the state.

B. THE STATE'S COMPELLING INTEREST IN THE PROTECTION OF CHILDREN WITHIN THE JURISDICTION OF THE JUVENILE COURT MAY TAKE PRECEDENCE OVER THE CONFLICTING FIFTH AMENDMENT RIGHTS OF A PARENT WHICH ARISE IN JUVENILE COURT CHILD PROTECTIVE PROCEEDINGS.

This case presents "another episode in

the conflict" between the constitutional rights of a parent and the authority of the state, Prince v. Massachusetts, 321 U.S. at 159. In recent years this Court has addressed the constitutional conflicts which arise in both civil and criminal proceedings involving the interests of the state in child protection. In addition to defining the parameters of a parent's Fourteenth Amendment due process rights in involuntary termination of parental rights, Lassiter v. Department of Social Services 452 U.S. 18 (1981); Santosky v. Kramer 455 U.S. 745 (1982), the Court, in a recent case, has considered the state's interest in child protection sufficiently compelling to warrant infringement upon the Sixth Amendment rights of a criminal defendant Pennsylvania v. Ritchie ___U.S.___, 107 S.Ct. 989 (1987). In earlier decisions this Court has considered the conflicts which arose between parents' religious

freedoms and the state's interest in child welfare. Prince v. Massachusetts 321 U.S. 158 (1944); Wisconsin v. Yoder 406 U.S. 205 (1972). It is largely to this group of decisions that amicus draws the Court's attention for they provide the still viable framework for resolving the conflict now before the Court. While the Court has not been confronted with a balancing of state and parents' interests involving the precise constitutional provision which forms the basis for this suit, these cases form a precedent for overriding the constitutional right of a parent in the interest of child protection. Indeed, these cases legitimize use of a balancing process in this case and suggest how that balance should be struck.

The argument of a parent that the interests of the state in child welfare must give way to the constitutional rights of a parent when the right involved emanates from some specific provision of the Bill of

Rights made applicable to the states through the Fourteenth Amendment is not unprecedented. This court has confronted the argument in several cases in which the parents sought to justify their actions on the basis of First Amendment rights.

In Prince v. Massachusetts, 321 U.S. 158 (1944) the child's custodian was convicted under provisions of the state child labor laws which prohibited parents or custodians from compelling or permitting children of certain ages to sell newspapers or participate in the exercise of any other trade on the street or public place. The custodian's challenge to the statute "rest[ed] squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental rights as secured by the due process clause of the latter Amendment" Prince, 321 U.S. at 164. Justice Reynolds

acknowledged the "sacred private interests basic in a democracy" which were implicated by the state's prohibiting a child from joining a parent in the distribution of a religious magazine. Prince, 321 U.S. at 165. Balanced against that individual right was the state's interest which was described as "no mere corporate concern of official authority. It is the interest of youth itself and of the whole community that children be both safeguarded from abuses and given opportunity for growth into free and independent well-developed men and citizens" Prince, 321 U.S. at 165. In sustaining the custodian's prosecution and conviction against her claims of First Amendment violations the Court concluded "that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes to some extent, matters of conscience and religious conviction" Prince,

321 U.S. at 167.

This Court considered the First Amendment - state child protection interest conflict again in Jehovah's Witnesses v. King County Hospital 278 F. Supp. 488 (W.D. Wash. 1967) aff'd mem., 390 U.S. 598, reh. den. 391 U.S. 961 (1967). The parents in that case were Jehovah's Witnesses; they challenged the power of the juvenile court to order that their children be given blood transfusions contrary to the expressed beliefs and direction of the parents. The three judge court convened to review the state statute under which the juvenile court derived its power to order the transfusions had concluded that Prince "does lay down the foundation, binding upon us for the particular state intervention in the name of the health and welfare which is here under review" Jehovah's Witnesses 278 F. Supp. at 504. In a per curiam opinion citing only Prince, the Court approved the juvenile

court's exercise of its parens patriae power to protect the health of children.

This tension between the exercise of First Amendment rights by the parent and a state's interest in the welfare of children was again considered in Wisconsin v. Yoder 406 U.S. 208 (1972). At issue in Yoder was the conflict between the state's interest in universal education and the fundamental religious freedom of the parents. The parents of teenage children had refused to send them to school beyond the eighth grade as a result of which they were convicted of violating the state's compulsory school attendance law. As members of the Old Order Amish religion, they insisted that their children's attendance at high school was contrary to their religion. This Court granted certiorari to review the decision of the Wisconsin Supreme Court which had reversed the parents' convictions on grounds that it violated the Free Exercise Clause of

the First Amendment made applicable to the states under the Fourteenth Amendment.

Although this Court affirmed the reversal of the convictions, it acknowledged the continued viability of a "balancing process" when an important state interest "impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. Yoder, 406 U.S. at 214. While the particular state interest sought to be advanced in Yoder was not "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause", Yoder, 406 U.S. at 214, the legitimacy of the balancing test itself was not undermined by the Court's decision. While it is difficult to meet the burden for subordinating First Amendment claims of the parent, the Court acknowledges that there are "those interests of the highest order [that] can overbalance legitimate claims to

the free exercise of religion" Yoder 406 U.S. at 215. The failure to find that the public interest in compulsory education of children beyond the eighth grade was not sufficiently weighty does not undercut the Court's previous ruling that there are such interests of the state which are sufficient to override this constitutional right. In fact in the latter part of the Court's opinion, there is a clear suggestion that the type of urgent interest as is presented in this case would compel a different resolution of the balancing test. In distinguishing Yoder from the decision in Prince v. Massachusetts, Chief Justice Burger notes: "This case, of course, is not one in which any harm to the physical or mental health of the child or to public safety, peace, order or welfare has been demonstrated or may be properly inferred." Yoder, 406 U.S. at 230.

Added to this group of cases is the

recent decision of the Court in Pennsylvania v. Ritchie ___U.S. ___, 107 S.Ct. 989 (1987), in which infringement upon a defendant's Sixth Amendment rights was found to be permissible in order to promote the state's interest in child abuse prevention. In Ritchie, the Court considered whether and to what extent a state's interest in the confidentiality of its child abuse investigation files must yield to a criminal defendant's Sixth and Fourteenth Amendments right to discover favorable evidence. In holding that depriving the defendant of the right of his counsel to review the file for exculpatory information was justified, the Court concluded that :

> To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child

> abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state designated person to whom he may turn and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected.

Ritchie, 107 S.Ct. at 1003. In Ritchie it was not the protection of the file itself which was the primary interest. Rather, protecting the file from full disclosure to defense counsel was important in advancing the state's interest in uncovering and treating child abuse. Insulating the report from defendants would foster the compelling interest the state has in the reporting of abuse and the encouragement of victims to seek counselling. Limiting the defendants constitutional right under these

circumstances was warranted.

Last term in Coy v. Iowa ___U.S. ___, 108 S.Ct. 2798 (1988), the Court emphasized the importance of considering individualized findings with respect to a particular child before a decision on overriding a defendant's Sixth Amendment right to confrontation could be made. The state had argued that a general legislative finding that victims of child sexual abuse needed special protection in the courtroom was sufficient to subordinate a criminal defendant's rights to confront his accusers. This generalized finding and the presumption of trauma upon which it was based was held to be an insufficient basis for permitting an exception to the rights embodied in the Confrontation Clause. In the absence of individualized findings that these particular witnesses needed special protection, the Court was unwilling to countenance any infringement upon the

defendant's rights Coy, 108 S.Ct. at 2805. Justices O'Connor and White in their concurring opinion would in "an appropriate case" involving child witnesses permit some diminution of defendant's rights. Coy, 108 S.Ct. at 2803. If case specific findings of necessity were made they concluded "our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses" Coy 108 S.Ct. at 2805.

These cases make it clear that the prevention of injury to a child is of paramount interest to the state. That interest has been balanced against constitutional rights which "have been zealously protected sometimes even at the expense of other interests of admittedly high social importance" Yoder, 406 U.S. at 214. But even though the individual rights involved are of constitutional magnitude, when the health and safety of a child are

endangered, the balance of rights and interests may tip decidedly in favor of the child's welfare.

Both the First Amendment and the provisions of the Fifth Amendment at issue here have been made applicable to the states by virtue of the Fourteenth Amendment. Cantwell v. Connecticut 310 U.S. 296 (1940) (First Amendment), Malloy v. Hogan 378 U.S. 1 (1964) (Fifth Amendment). However, no hierarchy of individual rights has been established which would place the Fifth Amendment rights of the parent above their First Amendment rights. There is no basis for concluding that one of the individual rights involved here is superior to another in our constitutional scheme. If those First Amendment rights of the parent may be overcome by societal interest in the protection of a child, then amicus submits that other individual rights may be subjected to a similar carefully

circumscribed balancing of interests. Consequently, if the interests of the state in child protection may, under some circumstances justify interference with a parent's First Amendment rights, then under appropriate circumstances a similarly narrow abridgment of Fifth Amendment rights may occur.

Such a balancing of competing interests is not unprecedented when Fifth Amendment rights are implicated. In California v. Byers 402 U.S. 424 (1971), this Court upheld a statute requiring drivers who were involved in an auto accident resulting in property damage to stop and provide their name and address to the owner of the damaged property. Chief Justice Burger observed "[t]he tension between a State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the

public need on the one hand, and individual claim of consitutional protections on the other", Byers, 402 U.S. at 427.

Justice Harlan, concurring in the Court's decision, described the Court's task as one of accommodation :

> [a]s uncertain as the constitutional mandate deprived from this portion of the Bill of Rights may be, it is the task of this Court continuing to seek that line of accommodation which will render this provision relevant to contemporary conditions.

Byers 402 U.S. at 454. In approving the state's compulsion that the driver in Byers provide the information sought, Justice Harlan considered several factors significant:

> ... the state has confined the portion of the scheme now before us ... to the minimal level of disclosure of information consistent with the use of compelled self reporting.. The Court must take cognizance of the level of detail required in the reporting programs as well as the circumstances giving rise to the duty to report...

Byers 402 U.S. at 456.

When the teachings of the Prince line of cases, the more recent decisions of the Court on Sixth Amendment conflicts with state child protection interests, and Byers are considered, the decision of the juvenile court in this instance should be affirmed. Under the court's order in this case the mother is being compelled to do only that which is essential to the court's fulfilling its obligation to ensure Maurice's protection. When the circumstances of the case are considered there is ample evidence of the need for the Court to see Maurice. Finally, there is no less intrusive alternative available to the court.

Little is known about what happened to Maurice since he returned to his mother's care almost two years ago. However, the record does contain crucial information about the mother's earlier treatment of him from which the court could and did infer

that he was currently in danger. At the time of the state's first intercession on Maurice's behalf, he was only four months old. J.A. 8 During the first few months of his life he had suffered four fractures, each in a different part of the body. J.A. 11, 13, 15 The physician who saw him at the time concluded that the injuries - to his arm, shoulder blade, shoulder socket and thigh - were very likely the result of child abuse. J.A. 12 With such a history the physician who had seen Maurice was concerned that the next injury might be fatal. J.A. 12

Furthermore, in the juvenile court, Ms. Bouknight agreed that Maurice was a Child In Need of Assistance, thus implicitly admitting that he had not received proper care and attention and that she was unable

or unwilling to do so.[18] J.A. 20 In her admission to the Court she had specifically conceded, among other things, that she had shaken and thrown Maurice when he was in the hospital for treatment of injuries considered to be the result of abuse, as well as the fact she suffered from emotional problems. J.A. 20

When the juvenile court made the decision to order Ms. Bouknight to produce Maurice it also had independent information about her mental health. In that psychodiagnostic evaluation, conducted only a month before Maurice was last seen, the psychologist expressed his unequivocal opinion that Ms. Bouknight was unable to care for and protect Maurice. J.A. 25

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[18] A Child in Need of Assistance is defined, in part, as a child who does not receive ordinary and proper care and attention and whose parents, guardian(s) or custodian(s) are unable or unwilling to give proper care and attention to the child and his problems. Md. Cts. and Jud. Pr. Code Ann. §3-801(e).

The court's order to produce Maurice also came after Ms. Bouknight agreed to be bound by the court's continuing jurisdiction over her and Maurice; she agreed to a number of conditions as a part of the court's order and the agency's agreement to return Maurice to her. App. Pet. Cert. 85a-87a Finally, she has not remained silent about Maurice's whereabouts. She purposefully misled the juvenile court when she told the judge that Maurice was with an aunt in Texas. J.A. 65-66

When these factors - the very young age of the child involved, a past history of abusive behavior toward the child, confirmed serious multiple injuries inflicted at different times, an unchallenged mental health assessment warning against custody being placed with the mother, her admission of abusive acts toward Maurice, her acceptance of the continuing jurisdiction of the court under an order of protective

supervision, and her deliberate misleading of the court and others in their attempts to locate the child - are all taken together amicus submits that the state's interest in the protection of this particular child is sufficiently high to compel the mother to produce Maurice.

Although the state may demonstrate a compelling interest sufficient to override individual constitutional rights, the infringement upon that right must be the least restrictive alternative necessary to achieve the state's goal. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 718 (1981), Port v. Heard 764 F.2d 423, 432 (5th Cir. 1985), See also Walker v. Superior Court 253 Cal Rptr. 1 (1988).

Maurice's mother knows where he is. She has not suggested that it is impossible for her to comply with the court's directive. No other alternative to determining his

whereabouts has been suggested by her nor is there any other apparent way of finding him. Both the resources of the police and the child protective agency have been used yet in more than a year's time they have still been inadequate. Maurice's mother is the sole source of the information which would bring Maurice to the jurisdiction of the court. She is not being asked to tell the court how Maurice got to where he is nor when he was placed there. Her role in his placement there is not the subject of the court's order. No questions are asked about her treatment of him since he was returned home nor is she questioned about others to whom she might have entrusted him. Given the gravity of the governmental interest at stake here, the minimal action which is called for on the part of the mother, and the specific evidence available to the court warranting an inference of danger to this particular child, overriding the mother's

Fifth Amendment right is justified and is the least intrusive alternative available. The social costs which result from adherence to the mother's position here are too great to be tolerated. New York v. Quarles 467 U.S. 649, 657 (1984).

The implications for the hundreds of thousands of children under protective supervision of the juvenile courts of adhering to the rule which Ms. Bouknight suggests are staggering. Fundamental to these courts' exercise of their parens patriae power is the ability to command the presence of the child. If parents are able to obstruct the court in this basic way then the court is rendered powerless, the parens patriae power is not simply diminished it is nullified for those children. The importance of the court's contempt power in such situations should not be lightly dismissed.

Recently, the National Council of Juvenile and Family Court Judges conducted a

survey of juvenile and family court judges from all over the United States. The judges were asked a series of questions about their authority and responsibility. Responses from judges in 42 states were received. The results of the survey suggest considerable judicial concern over the necessity for obtaining sufficient authority to exercise their judicial functions in child abuse and neglect cases. Authority to order sanctions/treatment for parents was ranked as the second greatest problem facing the juvenile courts among the judges surveyed. A majority of the judges (58%) cited their contempt powers as their most usual source of authority over parents abusing or neglecting their children. They have recommended that :

> Legislation should define contempt powers in relation to an enumerated series of circumstances which have resulted in noncompliance. There should be specific recitation within the juvenile and children's statutes

> with regard to the court's authority to enforce its treatment, service, and other restraining or protective orders applicable to the child, parents or guardian of the child, or the legal custodian or agency providing treatment or service"[19]

In the present case, the juvenile court had been given explicit statutory authority to order the child brought before the court and to utilize its contempt powers should the parent fail to cooperate. Md. Cts and Jud. Pr. Code Ann. §3-814 (c). Rather than diminish the existing contempt powers of the juvenile and family courts, judges from around the country have confirmed the importance of reaffirming and establishing explicit contempt powers if they are to fulfill their charge to protect the abused and neglected children under their jurisdiction.

Upholding the mother's refusal to

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[19] NCJFCJ, **Judicial Authority**, supra at 18.

produce Maurice also has serious implications for child welfare practice. By virtue of federal law[20], child welfare agencies like the BCDSS are mandated to provide reasonable efforts to reunite families whose children have been removed from the home as a result of abuse or neglect. In Maurice's case reunification occurred after the agency had some assurances that those efforts had made it reasonably safe to return him home to the mother. J.A. 29-32 Yet this return was a conditional one. J.A. 27-28 Doe v. Staples 706 F.2d 985 (6th Cir. 1983). Protective supervision was ordered and the court's jurisdiction was continued. If further protection of Maurice was necessary, the agency reasonably believed it could apply to the juvenile court and that that court had the authority to take additional action to

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[20] 42 U.S.C. §671(a).

protect Maurice. If the court is denied the authority to compel a parent to produce a child who has previously been adjudicated neglected or abused and is already a ward of the court, agencies will be reluctant to return children home and the courts equally unwilling to approve such a plan. Parents' attempts to regain custody of their children from foster care will be made more difficult. A more difficult threshold will be established and a more demanding test applied before the court will agree to place the child back in the home if its power to protect the child, even in the most dangerous situations, is extinguished by the parents' assertion of a Fifth Amendment right. Children will remain separated from their families for longer periods of time until virtually all risk is believed to be gone. These additional considerations of public policy also should be weighed heavily in determining whether or not Ms. Bouknight

can be compelled to bring her son to Court.

This case does not present the only instance in which Fifth Amendment rights of the parent have been the subject of conflict in the juvenile court. The conflict has arisen at various stages of juvenile court proceedings. In re Ryan M. 513 A.2d 837 (Me. 1986); In re S.A.V. 392 N.W.2d 260 (Minn. App. 1986); In the Matter of the Welfare of J.W. 391 N.W.2d 791 (Minn.1986) cert. denied sub nom. Minor v. Bureau of Social Services 107 S.Ct. 899 (1987); In the Matter of the Welfare of J.W. 415 N.W.2d 879 (Minn. 1987); In re Jessica B., 254 Cal.Rptr. 883 (Ct. App. 5th 1989).

Although amicus argues that a parent's Fifth Amendment right, if any is involved in the order challenged here, may be overridden by the state's compelling interest in the health and safety of the child under appropriate circumstances, no general abrogation of Fifth Amendment rights in the

context of abuse and neglect cases - civil or criminal - is suggested nor does this case require that the Court consider such a more encompassing rule.

Child abuse complaints and proceedings may give rise to Fifth Amendment conflicts in a number of different ways. For example, many cases of child abuse brought to the court's attention involve allegations of substance abuse on the part of parents. While the court may be justified in refusing to return a child to a parent who refuses to participate in treatment for such abuse, the state's interest in the child should not be used as a sufficient basis for compelling the parent to confess the extent of their drug involvement. Mere allegations of child abuse unsupported by competent evidence nor confirmed by judicial findings certainly should not be grounds for overriding parental constitutional rights. Assertion of a generalized goal of child

protection should not be sufficient to extinguish individual rights. In fact, that is not the case here. Rather, the determination of what, if any, interference with constitutional rights is warranted must be done on a case by case basis and will require individualized findings.

CONCLUSION

Ms. Bouknight asks this Court to depart from its precedents in which the compelling importance of the state's interest in the health and safety of children has been recognized. Those decisions have approved a balancing test when conflicts arise between individual constitutional rights and the state's interest in child protection. When the individual facts of this particular case are considered as they must be in conducting such a balancing, the abridgment, if any, of the mother's Fifth Amendment rights is justified.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(8)

Nos. 88-1182 and 88-6651

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IN THE

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OCTOBER TERM, 1988

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On Writ of Certiorari to the Maryland Court of Appeals

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society.

In the decision of the Maryland Court of Appeals in this case, an "extravagant extension" of the Fifth Amendment privilege of a suspect was held to override the right of the victim to the protection of the law. This is precisely the kind of tunnel-visioned approach to the criminal law that CJLF was formed to oppose. CJLF therefore has a substantial interest in this case.

SUMMARY OF FACTS AND CASE

On January 23, 1987, three-month-old petitioner Maurice M. was admitted to the hospital with a broken leg. Examination disclosed three previous fractures. Maurice's mother, respondent Jacqueline Bouknight, was observed throwing him into his crib. Petitioner Baltimore City Department of Social Services (DSS) had Maurice placed in foster care, but on July 17 physical custody was returned to Bouknight.

Bouknight later stopped cooperating with DSS, failed to comply with the custody order, and refused to produce Maurice or inform DSS of his whereabouts. The juvenile court awarded custody to DSS and ordered Bouknight to show cause why she should not be held in contempt. At a hearing, Bouknight stated that Maurice was with Bouknight's sister. She made no claim of inability to produce Maurice and no Fifth Amendment objection.[1]

1 This summary of the facts is taken from the majority opinion below *In re Maurice M.*, 550 A.2d 1135, 1136 (Md. 1988), and the dissent, *id.* at 1144-1145.

At a hearing the next day, after it was determined that the sister had not seen Maurice, the court found Bouknight in contempt and ordered her jailed until she produced Maurice or provided information as to his whereabouts. The court rejected repeated self-incrimination challenges to the order on the ground that compliance did not require testimonial communication.[2] The Maryland Court of Appeals (the highest state court) reversed, holding that the act of production was a testimonial communication which could not be compelled under the Fifth Amendment.[3]

The "evidence" which Bouknight has been ordered to produce, Maurice or his body, may very well be incriminating. The "physical evidence" cases, however, establish that there is no privilege to resist a production order on that ground. The act of production itself, on the other hand, is neither testimonial nor incriminating as those terms have been defined in this Court's "act of production" jurisprudence. Bouknight's connection with Maurice is a "foregone conclusion." Her present ability to determine his whereabouts, which she has never denied, does not present a real and substantial possibility of incrimination.

In addition, any person having custody of another person has an obligation to account for that person upon proper demand of the court, regardless of whether such an accounting may be incriminatory. This conclusion is a corollary of the "collective entity rule," and it is necessary to prevent the writ of habeas corpus from being made a dead letter.

2 *Id.* at 1137-1138.

3 *Id.* at 1141.

I. The act of production in this case has little or no testimonial significance.

A. "Private Papers" Cases.

Before 1976, Fifth Amendment objections to subpoenas duces tecum were generally analyzed in terms of whether the evidence sought constituted "private papers" under a combined Fourth and Fifth Amendment analysis. *Boyd* v. *United States*, 116 U.S. 616, 622-623, 633-635 (1886). *Boyd* relied heavily on the fact that but for the evidentiary value of the papers, Boyd had an unqualified right to possess them. *Id.* at 623-624. Thus, the *Boyd* rule did not apply when the right to possession belonged to someone other than the custodian, and that owner had no Fifth Amendment privilege. *In re Harris*, 221 U.S. 274 (1911) (receiver in bankruptcy); *Wilson* v. *United States*, 221 U.S. 361 (1911) (corporation); *Bellis* v. *United States*, 417 U.S. 85 (1974) (small partnership).[4]

B. "Physical Evidence" Cases.

Another line of cases developed the rule that a suspect's cooperation could be compelled so long as that cooperation did not amount to a testimonial communication. In *Holt* v. *United States*, 218 U.S. 245 (1910), the defendant complained that he was coerced into putting on clothing to determine if it fit. Justice Holmes, writing for a unanimous court, dismissed this "extravagant extension of the Fifth Amendment" and emphasized that the privilege is limited to communications. *Id.* at 252-253.

Holt was reaffirmed in *Schmerber* v. *California*, 384 U.S. 757 (1966), in which a drunk-driving defendant was compelled to

4 This line of cases is discussed in more detail in part II, *infra*, at 14-20.

cooperate in giving a blood sample. *Schmerber* rejected the notion that the Fifth Amendment forbids any compelled cooperation in the production of evidence.

> "[S]ince it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused 'by its own independent labors.'
>
> "As the passage in *Miranda* implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest." *Id.* at 762.[5]

In *Schmerber*, the defendant's cooperation was passive. The only requirement was that he not resist. Affirmative cooperation was required in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967).

Wade was required to participate in a lineup and speak for voice identification. 388 U.S. at 220. One of the dissents would have distinguished *Schmerber* on the ground that requiring Wade to speak was "forced cooperation by the accused" prohibited by the Fifth Amendment. *Id.* at 260 (Fortas, J., dissenting in part). Justice Brennan, writing for the majority, rejected this distinction and held, consistently with *Holt*, that nontestimonial, noncommunicative cooperation may be compelled. *Id.* at 222-223. Similarly, in *Gilbert*, *supra*, the defendant was required to give

5 The court went on to say that "the distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.* at 764.

handwriting exemplars. The exemplars were held nontestimonial. 388 U.S. at 266-267.

An additional level of suspect cooperation was required in *United States* v. *Dionisio*, 410 U.S. 1 (1973). While the previous cases had involved suspects in custody, Dionisio was subpoenaed by a grand jury to come in and give a voice exemplar. *Id.* at 3. Thus, Dionisio was required to perform an act of production implicitly verifying that he was the person subpoenaed and not an impostor. This Court did not find that difference significant and held that there was "no hint of testimonial compulsion," citing *Wade*, *Gilbert* and *Schmerber*. *Id.* at 7, n. 6. Justice Marshall's dissent did not question that *Wade* and *Gilbert* controlled, but implied that they were wrongly decided. 410 U.S. at 31-32.

C. Fisher, Doe I and Doe II.

Boyd was reexamined and effectively overruled in *Fisher* v. *United States*, 425 U.S. 391 (1976). The *Fisher* court reviewed the history of the *Boyd* rule, *id.* at 405-407, the subsequent developments in Fourth Amendment law, *id.* at 407-408, and the physical evidence cases, *id.* at 408. The Court concluded that the Fourth Amendment "foundations for the rule have been washed away," *id.* at 409, and that "the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person *only* against being incriminated by his *own compelled testimonial communications*," citing *Schmerber*, *Wade* and *Gilbert*. *Ibid.* (italics added).

Fisher then went on to recognize that "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced." *Id.* at 410. Compliance always involve some minimal concessions such as existence of the evidence and ability to produce it *at the time of compliance*, so "the more

difficult issues [of] whether the tacit averments ... are both 'testimonial' and 'incriminating' ... may instead depend on the facts and circumstances of particular cases...." *Ibid.*

The person claiming the privilege under *Fisher* must show that the testimonial and incriminating aspects of the act of production rise above some threshold. A long line of cases has held that the hazard of self-incrimination must be real and substantial. See *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *Rogers* v. *United States*, 340 U.S. 367, 374 (1951). *Fisher* added a similar threshold requirement to the testimonial aspect, holding that the implicit admissions must "rise[ ] to the level of testimony" to be "within the protection of the Fifth Amendment." *Fisher*, *supra*, 425 U.S. at 411. Where "the Government is in no way relying on the 'truthtelling' " of the act of production and the implicit concession "adds little or nothing to the sum total of the Government's information" then " 'no constitutional rights are touched. The question is not of testimony but of surrender.' *In re Harris*, 221 U.S. 274, 279 (1911)." *Ibid.*

Because application of the *Fisher* rule is fact-specific, *id.* at 410, an examination of the subpoenas and the surrounding circumstances in *Fisher*, its companion case *United States* v. *Kasmir*, and *United States* v. *Doe*, 465 U.S. 605 (1984)[6] is in order. In *Fisher* (No. 74-18) the documents subpoenaed were analyses by an accountant of taxpayer income and expenses. The taxpayers retrieved the documents from the accountant, apparently as a single bundle, and deposited them with their attorney. *Fisher*, 425 U.S. at 394. In the companion case (No. 74-611), the accountant workpapers relating to a specific client of the attorney were subpoenaed, along with copies of past tax returns, reports

6 Cited below as "*Doe I.*"

of the accountant, and correspondence between the taxpayer and the accountant. *Ibid.*

These subpoenas were reasonably specific. Although they refer to documents by category, the attorneys were not required to make "judgment calls" as to which of the documents in their possession fit the description.

Doe I presented a striking factual contrast to *Fisher*. There were five subpoenas issued. Two of them demanded, among other things, "all records pertaining to four bank accounts." *Doe I*, 465 U.S. at 606. "The third subpoena demanded the production of a list of virtually all of the business records of one of respondent's companies...." *Ibid.* There were 28 categories of documents in all. One category was simply "workpapers." *Id.* at 607, n. 1. Another was "names and home addresses of all partners, associates, and employers." *Ibid.* This is not a document at all, but rather a demand to either compile information or seek out documents on the basis of their content and turn them over. The Court noted that "[t]he subpoenas were drawn in the broadest possible terms." *Id.* at 608, n. 3. The fourth subpoena was similar to the third and added a category of documents which apparently did not exist: the "corporate" organizational documents of a sole proprietorship. *Id.* at 607, n. 2.

The decision upholding the act of production privilege in *Doe I* rests primarily on the explicit finding of the trial court that the act of production would involve testimonial self-incrimination. *Id.* at 613. The present case is easily distinguished on that basis, because the trial court found precisely the opposite. *In re Maurice M.*, 580 A.2d 1135, 1137 (Md. 1988). At present, though, there is little concrete guidance from this Court on what acts of production are testimonial. Without such guidance the Fifth Amendment will be measured by the proverbial chancellor's foot. Simple adoption of the trial court finding without analysis, as the main text of *Doe I* does, would not serve the interest of a uniform administration of justice.

The *Doe I* opinion does shed a little analytical light in the footnotes, however. Quoting the Court of Appeals, the subpoenas are characterized as "broad sweeping" and demanding "myriad documents." There was real doubt about the existence of some of the documents and about "John Doe's" connection to the business entities. *Id.* at 613-614, n. 12. The Court also noted that the Government was not "foreclosed from rebutting respondent's claim by producing evidence that possession, existence, and authentication were a 'foregone conclusion,' " citing *Fisher*. *Id.* at 614, n. 13.

Doe I is thus distinguished from *Fisher* primarily by the breadth of the subpoenas in *Doe* and by the impact of that breadth on the character of the act of production. In reviewing his documents to determine which ones are responsive to the vague subpoena, Doe would have been forced to form thoughts and beliefs on a difficult question and share them with the government. In responding to a demand for nonexistent documents, see *id.* at 607, n. 2, Doe would have had to explicitly state that the documents do not exist. That would be compelled testimony in its pure form.

The latest word on nontestimonial acts is *Doe* v. *United States*, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) ("*Doe II*"). The government asked the district court in that case to order a grand jury target to sign forms directing foreign banks to release information on any accounts the target may have had with those banks. The forms did not identify the banks or accounts, admit that accounts existed, or convey any other information to the government. The district court denied the order on the theory that the form implied existence and control of the accounts and authentication of the records. *Id.* at 2344, 101 L.Ed.2d at 192-193.

After reviewing *Fisher*, *Doe I*, and the physical evidence cases, the Court concluded that the policies of the Fifth Amendment "are served when the privilege is asserted to spare the accused from having to *reveal*, directly or indirectly, *his knowledge* of facts

relating him to the offense or from having to share *his thoughts and beliefs* with the Government." *Id.* at 2349, 101 L.Ed.2d at 199 (footnote omitted, italics added). What is protected from revelation, then is the suspect's knowledge of the facts, not the facts themselves as contained in documents, other chattels, or the body of a human being.[7]

Furthermore, it is the revelation of the knowledge, not the use of the knowledge, that is protected. Doe II and Gilbert were required to draw upon their knowledge of how to write in order to comply with the orders. This distinction appears most sharply in *Curcio* v. *United States*, 354 U.S. 118 (1957). *Curcio* held that a custodian of incriminating documents could not be forced to testify as to their location, *id.* at 128, while reaffirming that he could be compelled to produce them, an act which would necessarily draw upon his knowledge of their location, id. at 122, 127, n. 7.

Justice Stevens, dissenting in *Doe II*, proposed this hypothetical:

> "But can he be compelled to use his mind to assist the prosecution in convicting him of a crime? I think not. He may in some cases be forced to surrender a key to a strong box containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe — by word or deed." 108 S.Ct. at 2352, 101 L.Ed.2d at 203.

Does this contrast illustrate *use* of the mind or revelation of the *contents* of the mind? The strong box owner must use his mind to surrender the key. He must use his knowledge of the

7 That person may be the suspect, as in *Holt*, *Schmerber*, *Wade* or *Gilbert*, or someone else, as in the present case.

location of his key chain and his knowledge of which key fits the strong box. The safe owner, on the other hand, is revealing the contents of his mind. See *id.* at 2347, n. 9, 101 L.Ed.2d at 197 (majority opinion).

The hypothetical can be taken one step further. Could the safe owner be taken to the location of the safe and be compelled to open it while shielding the dial from the guard's view? That act would not reveal the combination, but it would reveal that the owner presently knows the combination. The owner may or may not be protected from that revelation depending on whether that knowledge is genuinely in dispute[8] and whether the fact of that knowledge, as opposed to the contents of the safe, presents a real and appreciable hazard of incrimination. This situation is not really different from that of the strong box key, where the act of production communicates the fact of present possession.

D. The Relevance of Present Possession

The majority opinion below held that production of Maurice would admit Bouknight's present ability to produce him and that this admission would be incriminatory. *In re Maurice M.*, 550 A.2d 1135, 1141 (Md. 1988). This contention raises a question which was settled very soon after the adoption of the Fifth Amendment.

During the proceedings against Aaron Burr for treason, the prosecution wished to introduce a coded letter addressed to Dr. Bollman, allegedly in the handwriting of Burr's secretary, Mr. Willie. Willie refused to answer whether he had copied the

8 That is, whether it is a "foregone conclusion." See *Fisher*, *supra*, 425 U.S. at 411; *Doe I*, *supra*, 465 U.S. at 614, n. 13. It would normally be a foregone conclusion if there is no dispute that the suspect does own the safe and does possess the premises where it is located.

paper. The prosecutor then said, "We will change our question. Do you understand the contents of that paper?" *United States* v. *Burr*, 24 F.Cas. 38, 38 (No. 14,692e, C.C.Va. 1807). He still objected on the ground that knowledge of the code would incriminate him of misprison of treason. *Ibid.*

After "a long desultory argument" by six lawyers over two days, *id.* at 39, Chief Justice Marshall ruled that the answer would not be incriminating.

> "But if the letter should relate to misdemeanor and not to the treason, the court is not apprized that a knowledge and concealment of the misdemeanor would expose the witness to any prosecution whatever. On this account the court was, at first, disposed to inquire whether the letter could be deciphered, in order to determine from its contents how far the witness could be examined respecting it. The court was inclined to this course from considering the question as one which might require a disclosure of the knowledge which the witness might have had of the contents of this letter when it was put in cipher, or when it was copied by himself; if, indeed, such were the fact. But, on hearing the question more particularly and precisely stated, and finding that it refers *only to the present knowledge of the cipher*, it appears to the court that the question may be answered without implicating the witness, because *his present knowledge would not*, it is believed, in a criminal prosecution, *justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact.*
>
> "The court is, therefore, of opinion that the witness may answer the question now propounded." *Id.* at 40 (italics added).

Burr is squarely on point.[9] Bouknight's present ability to produce Maurice is of little or no probative value in establishing that she had custody of him at the time that he suffered whatever injuries his physical condition may reveal. See *Maurice M.*, *supra*, 550 A.2d at 1146 (McAuliffe, J., dissenting). Her custody of him as of the last day the social worker saw him is a "foregone conclusion." If her defense is that she did not have physical custody at the time of the abuse, her present knowledge will neither justify a contrary inference nor afford the means of proving the contrary.

E. Communication with Counsel.

The Court of Appeals stressed that Bouknight's present incarceration requires her to communicate information to "someone" in order to comply. *Maurice M.*, 550 A.2d at 1141. That someone would quite obviously be the attorney provided for her and paid for by the state. There are two reasons why this does not amount to a Fifth Amendment violation. First, compelled testimony occurs only when a suspect is required to reveal his knowledge, thoughts or beliefs *to the government*. *Doe II*, *supra*, 108 S.Ct. at 2349, 101 L.Ed.2d at 199. The operation of the criminal law

9 The *Burr* opinion does not mention the Fifth Amendment, but that omission is probably based on an assumption that the Amendment simply codified the common law rule.

effectively compels communication *with counsel* all the time. See generally *Geders* v. *United States*, 425 U.S. 80, 88 (1976) (overnight recess case). Any confidential thoughts are protected by the attorney-client privilege. *Fisher*, *supra*, 425 U.S. at 405.

Second, the fact that Bouknight must now produce Maurice through an agent is due solely to her own initial contempt. At the time of the initial order she was not in custody and could have retrieved Maurice herself.[10]

In summary, the act demanded of Bouknight in this case does not rise to the level of incriminating testimony. The only fact which would be communicated by the act of production, other than "foregone conclusions," is the present ability to locate Maurice. That fact does not present a real, substantial danger of incrimination.

II. As guardian of the child, Bouknight has a duty to surrender custody.

The act ordered by the court in this case is something more than the mere disclosure of information. The court has ordered Bouknight to surrender the custody of a human being. Such orders are not unusual in American courts.[11] The claim of self-incrimination privilege is novel only because few have had

10 Bouknight apparently does not claim that production is impossible, only that she cannot produce Maurice without incriminating herself. Brief in Opposition to Petition for Writ of Certiorari at 7-8. If she should claim impossibility at this late stage, the case would be governed by *United States* v. *Rylander*, 460 U.S. 752 (1983).

11 See part IV, *infra*, at 26-28.

the effrontery to raise it. Cf. *United States* v. *Sullivan*, 274 U.S. 259, 264 (1927).

Precedents do exist, however, in cases involving the custody of property. Under circumstances far less compelling than the present case, the rule has evolved that a custodian of property must surrender the property when it is demanded by the government in any case where the government could rightfully demand possession from the owner. This rule applies when the property will incriminate the custodian and even when the act of production has testimonial, incriminatory aspects. The act of production does not have significant testimonial aspects in this case,[12] but even if it did that would not give Bouknight the right to wrongfully keep another person in her custody.[13]

The idea that the Fifth Amendment would provide a privilege to resist a subpoena duces tecum first surfaced in this Court in the case of *Boyd* v. *United States*, 116 U.S. 616 (1886). That case involved a forfeiture action against imported goods. The government subpoenaed an invoice to establish that the goods had been imported illegally. This Court held that such a subpoena for "private papers" violated both the Fourth and Fifth Amendments. However, the Court was careful to distinguish the situation where a court orders the surrender of forfeited or stolen goods themselves.

> "The search for and seizure of stolen or forfeited goods ... are totally different things from a search for

12 See part I, *supra*, at 4-14.

13 Bouknight apparently wishes the court to assume that Maurice is dead. See Brief in Opposition to Petition for Writ of Certiorari at 8. There is, however, no presumption to that effect, Md. Cts. & Jud. Proc. Code § 3-102 (1984), and in the absence of any evidence it would be inhumane to assume that we need not be concerned for his welfare.

and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cælo*. In the one case, the government is entitled to the possession of the property; in the other it is not." *Id.* at 623.

This "entitlement to possession" rationale was the basis for distinguishing *Boyd* in *Wilson* v. *United States*, 221 U.S. 361 (1911). A subpoena had been issued by a grand jury for papers written by a corporation president and in his custody but belonging to the corporation. The president's claim that the papers would incriminate him was rejected.

> "When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize." *Id.* at 385.

Three weeks later the Court decided another case on the same principle. In *In re Harris*, 221 U.S. 274 (1911), Harris had been ordered in bankruptcy proceedings to deliver his records to a receiver. He claimed that these records would incriminate him of fraudulently obtaining credit. *Id.* at 278-79. His attorney argued that the order required him to deliver incriminating private papers in violation of the Fifth Amendment, citing *Boyd*. *Id.* at 275. Justice Holmes, writing for the Court, quickly dispatched this argument.

> "But no constitutional rights are touched. *The question is not of testimony but of surrender*—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep.... *The right not to be compelled to be*

> *a witness against oneself is not a right to appropriate property that may tell one's story.*" *Id.* at 279-80 (italics added).

If the nature of the papers had been determinative, Harris's argument would have been correct, and *Boyd* would have been controlling. The papers in issue were "personal" as that term was then understood, not corporate. The determining factor was not the nature of the papers but the fact that someone else, not Harris, then had the legal right to possess the papers for reasons entirely separate from the value of the papers as evidence. *The privilege against self-incrimination cannot be used to defeat an independent right of possession.*

The distinction between delivery and testimony was sharply drawn in *Curcio* v. *United States*, 354 U.S. 118 (1957). Curcio was secretary-treasurer of an alleged "phantom union" under investigation by a grand jury. "There were two subpoenas—a personal subpoena *ad testificandum* and a subpoena *duces tecum* addressed to him in his capacity as secretary-treasurer of Local 269." *Id.* at 119. He failed to produce the records and refused to answer questions about their whereabouts. Although sustaining the objection to the questioning, the Court reaffirmed *Wilson* and *United States* v. *White*, 322 U.S. 694 (1944). *Curcio*, *supra*, at 122-25. The Court explicitly recognized that the failure to produce the records was punishable. *Id.* at 127, n. 7. "The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them." *Id.* at 128.

The reasons for what had come to be known as the "collective entity rule" were reviewed in *Bellis* v. *United States*, 417 U.S. 85 (1974). The first reason was the familiar distinction between representative action and individual action. *Id.* at 89-90. There

was also a second reason, however, which is more pertinent to the present case.

"The Court's decisions ... reflect a second, though obviously interrelated, policy underlying the privilege, the protection of an individual's right to a 'private enclave where he may lead a private life.' " *Id.* at 91 (citation and additional quote marks omitted). "Protection of individual privacy was the major theme running through the Court's decision in *Boyd* [citation] and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private papers at issue in *Boyd*. [Citation]" *Id.* at 91-92. The records of the three-member partnership in *Bellis* were not within the protected zone of privacy because the records were subject to regulation by partnership statutes or agreements and because all partners were generally guaranteed a right of access to the records. *Id.* at 96-99.

Applying *Bellis* to the present case, Bouknight has no legitimate privacy interest in concealing the whereabouts of her abused child. While there certainly are legitimate privacy interests in intrafamily relations, see, *e.g.*, *Moore* v. *East Cleveland*, 431 U.S. 494, 499 (1977), abuse of children is not one of them. Privacy rights must yield when they conflict with the overriding state obligation to protect the lives of children. *Roe* v. *Wade*, 410 U.S. 113, 163-164 (1973).

The state is entitled to know where Maurice is. Much more importantly, *Maurice* is entitled to the protection of the state, which can only be given if the state knows where he is. In *Bellis* the fiduciary duty of the partner to the partnership and the rights of the other partners to access the records were sufficient to defeat Bellis's *Boyd* claim. 417 U.S. at 98-99. In the present case, the interest of the state in protecting the child and the interest of the child in being protected make a far *more* compelling case that Bouknight has no legitimate interest in concealing his whereabouts.

The Court's Fifth Amendment / subpoena duces tecum jurisprudence took a 90-degree turn in *Fisher* v. *United States*, 425 U.S. 391 (1976). In that case and *United States* v. *Doe*, 465 U.S. 605 (1984)[14] the Court shifted the focus from the nature of the papers to the question of whether the act of production had any testimonial significance.[15] Two questions remained unanswered, however. First, did the privacy rationale of *Boyd* remain valid for intensely private papers such as diaries? See *Fisher, supra,* 425 U.S. at 401, n. 7; *id.* at 415, n. 1 (Brennan, J., concurring in the judgment). Second, did the *White-Bellis* line of cases remain a limitation on the ability of custodians to claim the new act of production privilege?

The latter question was answered in *Braswell* v. *United States*, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988). The president of a one-man corporation, as custodian of its records, was required to produce the records notwithstanding the trial court's determination that the act of production was incriminating, in part because "one in control of the records of an artificial organization undertakes an obligation with respect to those records foreclosing any exercise of the privilege." *Id.* at 2292, 101 L.Ed.2d at 111, quoting *Fisher, supra,* 425 U.S. at 429-430 (Brennan, J., concurring in the judgment).

The *Braswell* court also quoted the majority opinion in *Fisher*: "in *Wilson* ... and *In re Harris*, ... the custodian of corporate ... books or *those of a bankrupt business* was ordered to respond to a subpoena for the business' books even though doing so involved a 'representation that the documents produced are those demanded by the subpoena,' [citation]." *Braswell, supra*, at 2292,

14 Cited below as "*Doe I*."

15 *Fisher* and *Doe I* are discussed in more detail in part I of this brief at 6-11, *supra*.

101 L.Ed.2d at 111 (emphasis added). The citation to *Harris* in *Fisher*, reaffirmed in *Braswell*, is significant. It indicates that the term "collective entity rule" is underinclusive.

A bankrupt business is not necessarily a collective entity. In addition, the status of a bankrupt debtor is not necessarily a voluntary one. See 11 U.S.C. § 303. What distinguishes the sole proprietor in *Doe I* from the individual debtor in *Harris* is that but for the evidentiary value of "John Doe's" records he had the unqualified, unshared right to possess them. Harris, on the other hand, held his records only for the benefit of the bankrupt estate as soon as he filed bankruptcy. See generally, *Cameron* v. *United States*, 231 U.S. 710, 717 (1914).

Bouknight is in a position analogous to Harris's. She was granted custody of Maurice, but subject to certain obligations. She had the usual obligations of parenthood, see, *e.g.*, Md. Fam. Law Code § 5-203 (1984), and those imposed by the custody order. See J.A. 33. Her custody of Maurice was subject at all times to the authority of the state to demand his return in the event that Maurice's well being so required.

Braswell's duty as a corporate officer required him to deliver documents notwithstanding any incriminatory aspect of the act of production. So did Harris's obligation as the debtor in a bankruptcy proceeding. Can anyone seriously maintain that a parent's duty to account for the well being of a helpless child is any *less* than the obligations of these custodians of mere paper? On the contrary, the sacred trust of parental duty cries out for a far *greater* obligation.

III. The policies underlying the privilege do not support its extension to this case.

Discussions of the policies behind the Self-Incrimination Clause traditionally begin with the famous statement from *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964):

> "It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald*, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' [Citation]."

Two other discussions of the policy bases of the privilege are worth noting. In 8 Wigmore, Evidence § 2251, 295-318 (McNaughton rev. 1961), Professor McNaughton[16] lists and criticizes a dozen views of the underlying policy. He finds merit in only two and concludes that even these two will support only a much narrower privilege than the one we have. *Id.* at 318. A policy analysis which is much more friendly to the privilege may be found in McCormick, *Evidence* § 118, 286-288 (3rd ed. 1984).

16 This section of Wigmore is a complete rewrite by McNaughton. Wigmore's own views are found in the third edition, 1940, and are summarized by McNaughton in footnote 1 at pages 295-296. See also McNaughton, *The Privilege Against Self-Incrimination, Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications*, 51 J. Crim. L., C. & P.S. 138 (1960).

For the purpose of this discussion, we will address the seven *Murphy* reasons.

A. The "Cruel Trilemma."

The first basis of the privilege is "feeling that it is inhumane to force a witness to *choose among the three horns of the triceratops* — harmful disclosure, contempt, perjury." 8 Wigmore, *supra*, at 316 (italics in original). This "trilemma" exists in its pure form only when the answer is demanded under oath, because otherwise lying is not perjury. Even in the station-house interrogation, though, lying is immoral and may be legally punishable. See 18 U.S.C. § 1001.

One possibility is that a person would resolve the trilemma in favor of an involuntary confession, which is said to be "stultifying." See 8 Wigmore, *supra*, at 316. The fact that a person has been compelled to confess rather than reach the point of confession voluntarily is said to interfere with the psychologically necessary process of coming to terms with his own guilt. Gerstein, *The Demise of* Boyd*: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. Rev. 343, 347 (1979).

A second, and more likely, possibility is that the suspect will resolve the trilemma in favor of lying. The unseemliness of forcing a person to violate a sacred oath was probably a powerful reason for the privilege in a more religious age. McNaughton concedes it may retain some validity for the rare devout witness, but he goes on to say that "the prevalence of perjury today leads one to doubt that it is thought of by the average witness as a soul-destroying experience." 8 Wigmore, *supra*, at 317.

Aside from the religious aspect, though, there is something wrong with forcing a person to commit a crime and then punishing him for doing it. See *United States* v. *Grunewald*, 233 F.2d 556, (2nd Cir. 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1957). Our criminal law recognizes duress and entrapment as

defenses in appropriate cases. See, *e.g. Mason* v. *United States*, 84 U.S. 67, 73 (1873) (duress); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958) (entrapment). The law itself, then, should not force a person to commit perjury.

The danger of forced perjury exists only when there is a substantial possibility of deceit. In the physical evidence cases, deceit is not a real possibility. Schmerber could have submitted to blood testing or refused, but there was no way he could have given false blood. See *Schmerber* v. *California*, 384 U.S. 757, 765 (1966). In voice identification cases, any disguising of the voice would be obvious. See *People* v. *Ellis*, 65 Cal.2d 529, 534-535, 421 P.2d 393, 395-396 (1966) (Traynor, C. J.). In *Fisher*, *supra*, the accountant was readily available to identify his workpapers, and any attempt by the suspect to withhold some of them or substitute forgeries would have been immediately detected. In *Doe I*, *supra*, however, there would have been great opportunity for deceit. When a subpoena demands vaguely defined documents which may or may not exist, there is great temptation to withhold a portion of them and claim that those produced are all that exist. Such a subpoena places great reliance on the veracity of the accused. Cf. *Ellis*, *supra*, 65 Cal.2d at 534.

Thus the question of whether the act of production has significant testimonial, incriminating aspects is closely related to the question of whether deceit is one of the options available to the suspect. If the deceptive third option is not available, then the suspect is faced only with the simple dilemma of compliance or non-compliance and not the "cruel trilemma" denounced in *Murphy*.

As the dissent in the Court of Appeals noted in the present case, the ease of identification precludes a false production. Respondent can produce Maurice or not, but the production of a child who is not Maurice is not an option. *In re Maurice M.*, 550 A.2d 1135, 1146 (Md. 1988) (McAuliffe, J., dissenting).

B. The Accusatorial System, Questionable Confessions and Protection of the Innocent.

The second, sixth and seventh reasons listed in *Murphy* are closely related. We prefer an accusatorial system to an inquisitorial one. The reason we prefer it is that it forces the prosecution to locate other evidence which is more reliable than untrustworthy, self-deprecatory statements, "thus creating an additional assurance that every person convicted is in fact guilty as charged." McCormick, *supra*, at 287.[17]

This policy provides a powerful reason to distinguish between the compulsion of testimony and the compulsion of the surrender of nontestimonial evidence. As Chief Justice Traynor noted in *People* v. *Ellis*, 65 Cal.2d 529, 534, 421 P.2d 393, 395 (1966) the latter "is the very type of objective factual evidence, independent of information communicated by the accused, that the privilege encourages police to seek."[18] As discussed in the previous section, there is no opportunity for exculpatory lying by a guilty person in this situation. Conversely, "a knowing attempt at a false self-incrimination" is also practically impossible. *Id.* at 534, n. 4. When the suspect is merely compelled to surrender custody of a specifically identified object or person, the inquisitorial aspect of the demand vanishes along with the danger of false self-incrimination.

17 "There is a great deal of laziness in [torturing prisoners]. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." 1 J. Stephen, *A History of the Criminal Law of England*, 442 n. 1 (1883).

18 *Ellis* cites *Escobedo* v. *Illinois*, 378 U.S. 478, 488-489 (1964) in a footnote at this point.

C. Inhumane Treatment.

Little need be said on this point in the context of a court order to produce a tangible item. There is no danger of the "third degree" here. See 8 Wigmore, *supra*, at 315. Absent the prosecutor-suspect confrontation which is part of testimony or questioning, there is no danger of browbeating or bullying. See *id.* at 315-316.

D. Fair State-Individual Balance and Private Enclaves.

"[O]ur sense of fair play ... dictates 'a fair state-individual balance by requiring the government to leave the individual alone *until good cause is shown for disturbing him* and by requiring the government in its contest with the individual to shoulder the entire load,' [quoting 8 Wigmore, *supra*]." *Murphy*, *supra*, 378 U.S. at 55 (italics added). Bentham derisively called this the "fox-hunter's reason." 8 Wigmore, *supra*, at 298, n. 2, quoting 7 The Works of Jeremy Bentham 454 (Bowring ed. 1843). In its pure form it does indeed resemble the "sporting theory of justice" derided in our modern discovery jurisprudence. See, *e.g.* *United States* v. *Agurs*, 427 U.S. 97, 108-109 (1976). The theory has merit, though, in the areas where it overlaps with the other rationales.

The government should normally be required to shoulder at least the initial burden, as indicated in the italicized portion of the quotation above, to avoid the "pure 'poking about' fishing expedition" which "under Elizabeth and James amounted to the unlawful process of poking about in the speculation of finding something chargeable." 8 Wigmore, *supra*, at 314. Such unlimited poking would vest an intolerable amount of power in the prosecutor. *Id.* at 315. This is an overlap with the "accusatorial system" rationale. It is wholly inapplicable in a civil proceeding where the information is sought for reasons independent of prosecution. See *id.* at 318.

The second reason for limiting government poking is to preserve the "private enclave." This rationale is also wholly inapplicable to the present case. Whatever privacy rights a parent may have, they certainly must yield to a child's right to life. See p. 18, *supra*.

This leaves only the fox-hunter's theory that in a hypothetical future prosecution of Bouknight for child neglect, child abuse, or murder it would somehow be unfair to have compelled her to produce Maurice or his body. If Maurice is alive no rational person could conceivably contend that any "unfairness" justifies his continued concealment. Even if he is dead, though, does "fairness" really give an accused a license to hide physical evidence? That cannot be. "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1933).

In summary, then, where the "disclosure" sought is the surrender of custody of a human being who was undisputedly in the suspect's custody prior to his disappearance, none of the policies underlying the privilege against self-incrimination provide any support for the claim of privilege.

IV. Acceptance of respondent's position would eviscerate the writ of habeas corpus

In the early 1940's, Sheriff M. Claude Screws of Baker County, Georgia arrested one Mr. Hall, a black man, on a warrant charging theft of a tire. Screws and two other officers then beat Hall to death with a blackjack, committing the crime of violating his civil rights. *Screws* v. *United States*, 325 U.S. 91, 92-93 (1945). See 18 U.S.C. § 242.

What would happen if Bouknight's position were accepted by this Court, a latter-day Sheriff Screws were to commit a similar

crime and hide the body, and the victim's worried relatives were to obtain a writ of habeas corpus for him? Amicus submits that the sheriff could refuse obedience to the writ, citing this case.

The juvenile court in this case ordered respondent to produce in court the body of a human being in her custody. *In re Maurice M.*, 550 A.2d 1135, 1137 (Md. 1988). Although not designated as a writ of habeas corpus, the order commands precisely the same act. See Black's Law Dictionary 638 (5th ed. 1979). The order is a writ of habeas corpus in substance, if not in name.[19] Habeas corpus is not limited to persons in the custody of government agents. The writ may be directed to anyone detaining another person. It has been used in child custody cases in the state and English courts for well over a century. See *Lehman* v. *Lycoming County Children's Services*, 458 U.S. 502, 510-511 (1982); *In re Richard M.*, 14 Cal.3d 783, 537 P.2d 363 (1975); R. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus*, 453-460 (2nd ed. 1876).

Unquestionably, the creation of a broad new excuse for noncompliance with writs of habeas corpus would be inconsistent with the very foundation of American liberty. See, *e.g.*, A. Hamilton, *The Federalist* No. 84, 511-512 (Rossiter ed. 1961). To recognize the privilege against self-incrimination as an excuse for noncompliance any time the prisoner or his condition would incriminate the custodian would render the writ unavailable in the very cases where it is most necessary. It would be tantamount to a judicial suspension of the writ in violation of the Suspension Clause, U.S. Const. art. I, § 9, cl. 2.

19 "What's in a name? That which we call a rose/ By any other name would smell as sweet." W. Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

Unless the above hypothetical can be distinguished from the present case, this *reductio ad absurdum* demonstrates that Bouknight's argument is flawed. Yet the cases cannot be distinguished. The fact that the custody is private rather than governmental makes no difference. As noted above, the Great Writ is available for persons in private custody. The hypothetical sheriff has certainly not waived his self-incrimination privilege simply by accepting his office. See *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).

The applicable principle is the one derived from the document custodian cases, pp. 15-20, *supra*. Just as the privilege "is not a right to appropriate property that may tell one's story," *In re Harris*, 221 U.S. 274, 279-280 (1911), the privilege against self-incrimination can never be used to wrongfully withhold custody of the body of a human being, whether alive or dead.

CONCLUSION

The decision of the Maryland Court of Appeals should be reversed.

Dated: May, 1989

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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JUN 1989
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No. 88-1182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF THE JUVENILE PROTECTIVE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does a court order directing a mother to produce her previously abused infant son compel incriminating testimony in violation of the mother's Fifth Amendment privilege against self-incrimination?

2. If such compelled production invokes the Fifth Amendment privilege, has the mother waived her privilege where she implicitly agreed to produce her child, has already testified as to his whereabouts, and has lied to the court?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Juvenile Protective Association ("JPA") is a private non-profit social service agency dedicated to the treatment of abused, neglected, and exploited children and their families. Founded in 1901 by Jane Addams, JPA is one of only about ten privately funded agencies in the country with an outreach program whose sole purpose is to provide protective services for children. With a staff of clinically trained social workers and professionals knowledgeable about child development, state agencies, police, and court systems, JPA provides many thousands of hours of counseling for abused and neglected children and their families each year. JPA prides itself on its success in keeping families together and in improving the families' quality of care for their children. JPA includes among its accomplishments support for the first juvenile court in the country and for the first child labor laws.

JPA's interest in this case derives from its understanding of the scope of judicial authority in connection with child abuse cases and of the tragic implications of allowing parents to refuse to produce their previously abused children upon order of a juvenile court. Specifically, JPA believes that if respondent can successfully invoke the Fifth Amendment and avoid having to produce her child, countless children in this country will have no source of protection and the child welfare system will be impotent. Such extreme applications of the privilege should be avoided where a child's life is at stake.[1]

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[1]Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

CHILD WELFARE BACKGROUND

The problem of child abuse is approaching epidemic proportions in our country. Reports of child abuse and neglect have soared, reaching an estimated *25.2 million reports nationwide* against families in 1986, an increase of 66% from 1980. U.S. Department of Health and Human Services, *Study of National Incidence and Prevalence of Child Abuse and Neglect: 1988* (1988) *("National Incidence")*. The number of child abuse fatalities also rose in 1988, placing the number of deaths at more than 1,100 for the third straight year. National Committee for Prevention of Child Abuse, *Child Abuse Fatalities Continue to Rise: The Results of the 1988 Annual Fifty State Survey* 13 (1989) *("Fatalities")*.[2] Further, among children less than one year old, homicide, "often representing lethal cases of child abuse," is the leading cause of injury-related deaths. Waller, Baker & Szocka, *Childhood Injury Deaths: National Analysis and Geographic Variations*, 79 Amer. J. Pub. Health 310, 314 (1989). Even more frightening than these statistics is the realization that many cases of abuse never come to the attention of anyone outside of the family. The actual magnitude of the problem, therefore, will never be known.

A. Development Of The Child Welfare System.

The child welfare system was born in the United States in the second half of the nineteenth century. Garrison, *Child*

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[2]Since 1985, child abuse fatalities have increased over 36%. *Fatalities, supra*, at 15. These figures probably represent a low estimate of the tragedy because the specific label a death may receive often is inaccurate. "Research has consistently found that some percentage of accidental deaths, child homicides, and Sudden Infant Death Syndrome (SIDS) cases might be more appropriately labeled a child maltreatment death if comprehensive investigations were routinely conducted." *Id.*

Welfare Decisionmaking: In Search of the Least Drastic Alternative, 75 Geo. L. J. 1745, 1750 (1987). Recognition of the power of the state to protect children grew out of the *parens patriae* concept, that is, the government's responsibility to protect the interests of those who lack legal capacity. Mnookin, *Foster Care — In Whose Best Interest?*, 43 Harv. Educ. Rev. 599, 603 (1973) *("Foster Care")*. Recognizing the importance of intervention on behalf of the child, every state has the statutory authority to intervene into the family, and even remove a child from the home, in order to protect the child. *Id.* at 604.[3]

Child abuse was not recognized as a wide-spread problem in American society until the 1960's when many states began enacting laws which mandated reporting of abuse to public agencies. Between 1963 and 1966, 49 states enacted child abuse reporting laws. Sussman & Cohen, *Reporting Child Abuse and Neglect: Guidelines for Legislation* (1975), cited in *National Incidence, supra*, at 1-2. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq.* (1983), which authorizes grants for state child protection services and studies of the prevalence of child abuse nationwide.

B. Reporting, Investigation, And Follow-Up.

The child abuse reporting and investigatory process generally begins when a report is filed by a social worker, a neighbor, the police, a doctor, a teacher or another individual.[4] It is important to note that older children, who are

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[3]In Maryland, for example, several statutes allow for removal of the child from the home where there is cause to believe that the child is in serious danger. *See, e.g.*, Md. Cts. & Jud. Proc. Code Ann. §§ 3-814 and 5-709 (1984).

[4]Statutes in many states require doctors, teachers and various other individuals to file reports when appropriate. *See, e.g.*, Md.

routinely in contact with a larger number of individuals, have a greater chance of being recognized and reported as abused. Infants such as Maurice — the child whose welfare is at stake here — may have no contact with any adult other than their parents.[5] Consequently, access to infants by child protective agencies is of great importance.

Once reports are received by the appropriate agency, investigation and follow-up begin. Investigation may include a home visit with the suspect family or an interview with the child. In most child abuse investigations, interviewing, observing, or examining the child is essential to determine whether or not the child has been mistreated. Particularly in a case where the child is not old enough to speak, examination of his or her body is the only way to tell if the child has been physically abused.

State laws authorize law enforcement officials or child protection agency employees to take children into custody under specific circumstances even prior to the filing of a child abuse or neglect petition. *See Foster Care, supra,* at 605 n.19.[6] Child protection agencies may arrange for physical examinations in the course of taking emergency custody of a child, even in the absence of parental consent. *Id.*

Cts. & Jud. Proc. Code Ann. §§ 5-704, 5-705 (1984). In this case, the Baltimore City Department of Social Services ("DSS") received a report about Maurice's suspicious multiple fractures after he was hospitalized on January 23, 1987. *In re Maurice M.*, 550 A.2d 1135, 1136 (Md. 1988).

[5]It is estimated that in 1986, 2.1 out of every 1,000 children aged 0-2 years old were physically abused. *National Incidence, supra,* at 5-10.

[6]Section 3-814(c) of the Maryland Code specifically grants the state authority to take a child into custody and to bring the child before the court where his or her parents have refused to do so.

If, after investigation, it is determined that abuse or neglect has occurred, follow-up services begin. When possible, the child remains in the home.[7] Family preservation services often include intensive in-home assistance, counseling, homemaker services, emergency caretaking, protective day care, and parenting education. These services are provided until it is determined that they no longer are needed. The only objective measure by which child welfare workers can make that determination and assess the parents' growth and capacity to care for the child is by seeing the child.

C. Effects Of Allowing Parents To Refuse To Produce Their Previously Abused Children.

Without the power to compel production of a previously abused child from parents who have regained physical custody, the state is faced with a dilemma. It may leave the child in the home but forfeit the ability to monitor the ongoing well-being of that child. Since the state would have no recourse should parents refuse to cooperate with child welfare agencies, thousands of children like Maurice would be completely unprotected.[8]

Alternatively, the state could remove children from their homes at the first sign of abuse. The children could be placed in foster care until the parent proved that he or she

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[7]Family preservation, whenever possible, is the preferable result in child abuse or neglect cases. The federal government and many states have enacted legislation which specifically requires that efforts be made to keep children in their own homes and together with their families. *See, e.g.,* Child Welfare Services, 42 U.S.C. § 620 *et seq.* (1983).

[8]This Court has recently seen the tragic results of state inaction in a case where a small child remained in the custody of an abusive parent. *See DeShaney* v. *Winnebago County DSS,* 109 S. Ct. 998 (1989).

was a capable and competent parent. However, agencies would be reluctant to return custody to a parent if that parent could later refuse to disclose information about the child despite orders to cooperate with the child welfare agency.[9] The result would be prolonged foster care, which generally is not in the child's best interest.[10]

In theory, foster placement should continue only for a short period of time, during which the state ideally should provide the child and parent with services designed to resolve the problems that caused their separation. Typically, however, agencies do little to help parents regain custody of their children. Vasaly, *Foster Care in Five States* 34 (1976), cited in Garrison, *Why Terminate Parental Rights?*, 35 Stan. L. Rev. 423, 428 (1983) *("Parental Rights")*. Consequently, the placements are all too often more than temporary.[11] Moreover, studies performed to determine the effect of foster care on children are not encouraging. One of the most alarming problems caused by foster care is what has been termed "foster care drift," that is, the gradual failure of the child to form any significant relationship with a parental figure. *Parental Rights, supra,* at 426.

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[9]Respondent was given physical custody of Maurice on August 18, 1987 under an Order of Protective Supervision. *Maurice M., supra,* 550 A.2d at 1136. Had the court or DSS known, however, that she would later refuse to produce the child as she had agreed to do, it is quite probable that she would not have been granted custody in the first place.

[10]It has been estimated that, in 1985, some 272,000 children were in substitute care of some sort in the United States. Voluntary Cooperative Information System, *Characteristics of Children In Substitute and Adoptive Care* 28 (1988).

[11]The House Ways and Means Committee reported in 1979 that 48% of foster children remain in foster care for more than 2½ years. H.R. Rep. No. 136, 96th Cong., 1st Sess. 46 (1979).

From the parent's point of view, the child's removal from the home is detrimental in several ways. Obviously, the loss of the child himself is difficult. Perhaps more important, however, if the child is removed from the home, the parent cannot demonstrate her competence by showing that she can care for her child and provide for his ongoing physical well-being. In sum, keeping the child in the home is generally the preferable alternative. However, that alternative would likely be unavailable if the child welfare system were stripped of its ability to monitor the physical well-being of this country's children.

STATEMENT OF FACTS

Maurice M. is only a toddler but his short life has been full of violence and brutality. At the age of three months, he was admitted to the hospital with a broken leg. Doctors found much more; Maurice's small body was covered with partially-healed fractures which strongly indicated abuse. Maurice's case was referred to DSS and he was adjudged to be a Child In Need of Assistance. He remained in shelter care for several months but was eventually returned to his mother, the respondent in this case, under an Order of Protective Supervision. In exchange for custody, respondent agreed, among other things, to fully cooperate with DSS. She consistently has refused to live up to that agreement.

In April, 1988, DSS filed a petition in the circuit court representing that respondent had not complied with the Order of Protective Supervision and, moreover, that she refused to inform DSS of Maurice's whereabouts. After several hearings, DSS was awarded custody of Maurice and respondent was found to be in contempt of court for refusing to produce the child or inform authorities of his location. She was ordered confined in the Baltimore City Jail until she purged herself of the contempt by producing Maurice or

by providing information to DSS, the police, or the court as to his whereabouts.[12]

SUMMARY OF ARGUMENT

The Fifth Amendment privilege against self-incrimination does not prohibit an order directing a parent who has custody of her previously abused child under an Order of Protective Supervision to produce that child before the juvenile court. The privilege applies only when a person is compelled to make a *testimonial communication* that is *incriminating. Fisher* v. *United States,* 425 U.S. 391, 408 (1976). Forcing respondent to produce her young son does not compel incriminating testimony so as to invoke the Fifth Amendment privilege.

First, respondent's production of her son is not sufficiently testimonial for purposes of the privilege. Any physical evidence contained upon the person of her child clearly is not testimonial. Moreover, the minimal testimonial assertions implied in the act of producing the child, *i.e.,* that the child produced is in fact is Maurice and that respondent has control over him, are "foregone conclusions" that do not rise to the level of Fifth Amendment protection. *Fisher, supra,* 425 U.S. at 411.

Second, the minimal testimonial aspects of compelling respondent to produce her child do not confront her with "substantial hazards of self-incrimination." *California* v. *Byers,* 402 U.S. 424, 429 (1971). Respondent is legally charged with the custody and control of her infant son. The

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[12]A detailed description of the undisputed facts of this case is set forth in the majority and dissenting opinions of the Court of Appeals of Maryland. *Maurice M., supra,* 550 A.2d 1135. A statement of the opinions in the courts below is contained in the Petition for Writ of Certiorari, *Baltimore City Department of Social Services* v. *Bouknight* (No. 88-1182) ("Cert. Petition").

only potential for incrimination would arise from the unprivileged physical evidence that may be present on the body of the child. Further, society's important interest in protecting children in jeopardy of serious bodily injury strongly counsels against so extreme an application of the Fifth Amendment privilege.

Finally, even were the privilege to be applicable in the circumstances of this case, respondent has waived her privilege because she implicity agreed to produce her child, already testified as to his whereabouts, and knowingly deceived the court.

ARGUMENT

I.

A JUVENILE COURT ORDER DIRECTING A PARENT WHO HAS CUSTODY OF HER PREVIOUSLY ABUSED CHILD UNDER AN ORDER OF PROTECTIVE SUPERVISION TO PRODUCE THAT CHILD BEFORE THE COURT DOES NOT COMPEL INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The self-incrimination clause of the Fifth Amendment provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Although the importance of the privilege against self-incrimination cannot be questioned, "[t]he importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike." *Michigan* v. *Tucker,* 417 U.S. 433, 439-40 (1974).

> Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a

> sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber — the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source.

Doe v. *United States*, 108 S.Ct. 2341, 2348 (1988) (*"Doe II"*). *See also Ullman* v. *United States*, 350 U.S. 422, 428 (1956), in which Justice Frankfurter acknowledged that the privilege "was aimed at a . . . far-reaching evil — a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."

In *Schmerber* v. *California*, 384 U.S. 757 (1966), this Court found "one overriding thought" informing the "complex of values" that the privilege against self-incrimination helps to protect:

> To maintain a "fair state-individual balance," to require the government to "shoulder the entire load" . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

Id. at 762 (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966)).

The Court also has recognized, however, that although the complex of values underlying the privilege is broad, "the privilege has never been given the full scope which the values it helps to protect suggest." *Schmerber*, *supra*, 384 U.S. at 762. Indeed, the decisions of this Court repeatedly have made clear that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence"; rather, it applies only when

a person is compelled to make a *testimonial communication* that is *incriminating*. *Fisher*, *supra*, 425 U.S. 391. *See also Doe II*, *supra*, 108 S. Ct. at 2346.

The Fifth Amendment does not proscribe the compelled production at issue in the present case. Respondent's production of her previously abused child, who was left in respondent's custody under an Order of Protective Supervision, is not sufficiently testimonial to invoke the privilege against self-incrimination. Moreover, it does not confront respondent with substantial hazards of incrimination. Finally, in their efforts to compel respondent to produce her young son, DSS and the juvenile court are not trying to disturb the "state-individual balance," or to shirk their responsibility to "shoulder the entire load." Their purpose is not among "the evils at which [the privilege] was to strike." They are simply trying to save a child's life. The Fifth Amendment should not be misused to thwart their efforts.

A. The Court Order Directing Respondent To Produce Her Previously Abused Infant Son Is Not Sufficiently Testimonial For Purposes Of The Fifth Amendment Privilege.

1. "[T]he privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber*, *supra*, 384 U.S. at 761. Thus, the Fifth Amendment is no bar to the government compelling production of nontestimonial physical evidence, no matter how incriminating that evidence may be. *See, e.g., Fisher*, *supra*, 425 U.S. 391 (compelled production of subpoenaed documents); *Gilbert* v. *California*, 388 U.S. 263 (1967) (compelled production of handwriting exemplar); *United States* v. *Wade*, 388 U.S. 218 (1967) (compelled production of voice exemplar); *Schmerber*, *supra*, 384 U.S. 757 (compelled production of blood sample). In short, "compulsion which makes a sus-

pect or accused the source of 'real or physical evidence' does not violate [the Fifth Amendment]." *Schmerber, supra,* 384 U.S. at 764.

However, although physical evidence such as the contents of a document may not be privileged, the act of producing the evidence may be. *Fisher, supra,* 425 U.S. at 410. In *Fisher,* this Court was presented with the question of whether, in response to a subpoena, an attorney must produce tax records prepared by a client's accountant and entrusted to the attorney by the client. In considering whether the client would himself have had a valid Fifth Amendment claim had he retained the records, the Court easily dismissed the argument that the contents of the tax records were privileged. *Id.* at 409-10. The Court observed, however, that

> [t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers were those described in the subpoena.

Id. at 410. Thus, an "act of production" may itself have protected testimonial aspects if it implies assertions of fact. *Doe II, supra,* 108 S.Ct. at 2347.[13]

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[13]Alternatively, the act of producing physical evidence may be viewed as testimonial where it "substantiates the suspect's ability to perform the task requested. Thus, . . . a suspect compelled to provide a sample of his handwriting testifies that he can do so, *i.e.,* that he can write . . . ." Geyh, *The Testimonial Component of the Right Against Self-Incrimination,* 36 Cath. U. L. Rev. 611, 614 (1987).

If, however, the act of production does not communicate any factual assertions, implicit or explicit, or convey any information, it does not have testimonial significance and is not privileged. *Doe II, supra,* 108 S.Ct. at 2350-52. In *Doe II,* the Court considered whether a court order compelling the target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose information on any of his accounts violated his Fifth Amendment privilege against self-incrimination. The Court found that execution of the consent directive would not have testimonial significance because the document did not identify or acknowledge the existence of any particular account. Therefore, compelling the target to sign the document did not violate his Fifth Amendment privilege.

Nor is this result changed if the "act" of production consists of verbally disclosing the location of the sought-after evidence. As this Court has recognized, the same test for determining whether a compelled act is "testimonial" applies to oral or written statements as well. *Doe II, supra,* 108 S.Ct. at 2347. The *Doe II* Court could find "no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another in the context of verbal statements." *Id.* at 2347 n.8.[14]

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[14]As the majority of the Court of Appeals of Maryland recognized, the juvenile court's order does not in fact compel respondent "to verbally disclose Maurice's whereabouts" or even "to utter a sound." *Maurice M., supra,* 550 A.2d at 1141. The order directs respondent to produce her child before the court so that he can be returned to shelter care. *Id.* at 1137. It also provides an alternative to her physically delivering the child to the court; *i.e.,* she can provide information as to the child's whereabouts to DSS or to the police. *Id.* Thus, respondent has the opportunity to surrender her child through her actions or her words. Production of the child, however, is not privileged under the holdings of this

Moreover, it is the *compelled communication itself* — be it an act or a written or oral statement — that must explicitly or implicitly relate a factual assertion or disclose information. *Id.* at 2347. If a compelled act or statement is not testimonial and, therefore, is not privileged under the Fifth Amendment, "it cannot become so because it will lead to incriminating evidence." *Id.* at 2346 n.6 (citation omitted).[15]

Finally, not all acts that do imply assertions of fact and, therefore, may be considered testimonial in nature, rise to the level of Fifth Amendment significance. Under the facts and circumstances of a particular case, an implicit assertion of fact or disclosure of information may be "self-evident," representing little more than a "foregone conclusion" or a "near truism," and thus of "minimal testimonial significance." *Fisher, supra,* 425 U.S. at 411-12. In *Fisher,* for example, where the existence and possession or control of the subpoenaed documents were not in issue, their com-

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Court irrespective of the method by which respondent chooses to comply.

[15]In *Doe II,* the Court firmly rejected the argument that a compelled statement is testimonial merely because "the Government could use the content of the speech or writing, as opposed to its physical characteristics, to further a criminal investigation of the witness." *Doe II, supra,* 108 S.Ct. at 2346. The Court noted that this assertion "confuses the requirement that the compelled communication be 'testimonial' with the separate requirement that the communication be 'incriminating.' " *Id.* at 2346 n.6. The Court found that the prohibition on the use of incriminating evidence derived from compelled testimony "assumes that the suspect's initial compelled communication is testimonial." *Id.* "In order to be privileged, it is not enough that the compelled communication is sought for its content. The content itself must have testimonial significance." *Id.* at 2348 n.10.

pelled production was not "sufficiently testimonial" for purposes of the Fifth Amendment privilege. *Id.* at 411.[16]

2. The physical evidence contained within the person of a child clearly is not testimonial, and thus is not privileged. Therefore, respondent cannot avoid compliance with the juvenile court's order by asserting that the evidence she is required to produce may be incriminating. *Fisher, supra,* 425 U.S. at 410. The only argument available to respondent is that she has an "act of production" privilege, *i.e.,* that the act of producing Maurice would have independent testimonial significance which could incriminate her and, therefore, that the state may not constitutionally compel that act. *Doe II, supra,* 108 S.Ct. at 2345.[17]

It is true that by producing Maurice in response to the court's order, respondent would implicitly acknowledge that the child she produced is in fact Maurice and that she has sufficient control over her child to be able to produce him before the court. This is the kind of "simple acknowledg-

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[16]*Compare Fisher with United States* v. *Doe,* 465 U.S. 605 (1984) *("Doe I")*, where the Court held that the act of producing subpoenaed documents was privileged. The Court relied on determinations by the lower courts that, by producing the documents, the claimant would admit that the records existed, were in his possession, and were authentic. *Id.* at 613 nn.11 & 12. Moreover, the government had failed to make a showing "that possession, existence, and authentication were a 'foregone conclusion.' " *Id.* at 614 n.13 (quoting *Fisher, supra,* 425 U.S. at 411).

[17]In *Fisher, supra,* 425 U.S. at 409, the Court recognized that "the Fifth Amendment would not be violated by the fact alone that the [subpoenaed] papers on their face might incriminate the taxpayer." Similarly here, the Fifth Amendment would not be violated by the fact alone that examination of respondent's child might incriminate her, "for the privilege protects a person only from being incriminated by his own compelled testimonial communications." *Id.*

ment," however, that "is not 'sufficiently testimonial for purposes of the privilege.' " *Doe II, supra,* 108 S.Ct. at 2351 n.15 (quoting *Fisher, supra,* 425 U.S. at 411). First, respondent's implicit authentication of the child produced as Maurice would indeed be "self-evident":

> Under the facts here present, it is virtually certain that proof of identity exists and can be readily presented by the State without the necessity of any implied voucher by the mother. Putting aside the question of identification by modern scientific comparison techniques, or the probable identification by neighbors or photographs, it can hardly be doubted that positive identification could be established by comparison of current and previous x-rays. The number of documented fracture sites in the body of this two-year old child virtually guarantees identification.

Maurice M., supra, 550 A.2d at 1146 (McAuliffe, J., dissenting) (footnote omitted).

Second, the implied assertion that respondent has control over the child is a "foregone conclusion." As a legal matter, respondent's control over the child is established by the terms of the Order for Protective Supervision. Under that order, respondent has had "control" over Maurice since July 17, 1987, when physical custody of the child was returned to her. *Maurice M., supra,* 550 A.2d at 1136. Moreover, she has never denied that she could produce Maurice and, in fact, has admitted continuing control over the child on at least two occasions. Cert. Petition at 7, 16-17. *See also Baltimore City Department of Social Services* v. *Bouknight,* 109 S.Ct. 571, 571 (1988) (Rehnquist, J., Circuit Justice) ("There is no indication that she is unable to comply. . . . "). Thus, irrespective of whether respondent produces Maurice, control over the child is imputed to her as a matter of law. *Compare Fisher, supra,* 425 U.S. at 411 ("Surely the Government is in no way relying on the 'truthtelling' of the

taxpayer to prove the existence of or his access to the documents.") (quoting 8 Wigmore § 2264).

In such circumstances, where the identification and control of the child are clearly established, his compelled production is not "sufficiently testimonial" for purposes of the Fifth Amendment privilege. *Fisher, supra,* 425 U.S. at 411. "Under these circumstances by enforcement of the [juvenile court's order] 'no constitutional rights are touched. The question is not of testimony but of surrender.'" *Id.* (quoting *In re Harris,* 221 U.S. 274, 279 (1911)).

B. The Court Order Directing Respondent To Produce Her Previously Abused Infant Son Does Not Confront Her With Substantial Hazards Of Self-Incrimination So As To Invoke The Fifth Amendment Privilege.

Even assuming that the minimal testimonial aspects of compelling respondent to produce her child may rise to the level of constitutional significance, her claim to the privilege still must fail because the hazards of self-incrimination resulting from these implicit acknowledgements are not substantial. That is, the communication she is compelled to make is not incriminating to a degree that implicates the Fifth Amendment. In this regard,

> [i]t bears emphasizing that *the testimonial communication itself must transmit incriminating knowledge or information* before the right will apply. The fact that a suspect is compelled to make an innocuous communication incidental to the act of producing incriminating but uncompelled or nontestimonial evidence, will render neither the evidence produced nor the act of its production eligible for fifth amendment protection. In such a case, the act of producing evidence is testimonial and compelled, but not incriminating, while the

> evidence itself is incriminating, but either uncompelled or nontestimonial.

Geyh, *supra,* at 638-39 (emphasis added) (citation omitted). In the present case, the evidence — respondent's young child — may be incriminating but it is nontestimonial, while the act of production itself, even if minimally testimonial, is not sufficiently incriminating. The two "could not be combined to form a single fifth amendment violation." *Id.* at 639.[18]

The identity of the child and respondent's control over him cannot be disputed. Indeed, as his mother, and the person to whom his physical custody was entrusted, she is legally charged with his custody and control. Thus, it would be surprising — and incriminating — if she could *not* locate him. The only potential for incrimination, should criminal charges be brought against respondent, would arise from the physical evidence contained in the person of her child, *i.e.*, nontestimonial and thus nonprivileged physical evidence. The minimal testimonial aspects of her act of producing the child are not constitutionally incriminating because it is a "foregone conclusion" that she can do so.[19]

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[18]The majority of the Court of Appeals of Maryland believed that, by producing Maurice or disclosing his location, respondent would, "in the event a crime had been committed upon Maurice's person, be incriminating herself by, in effect, disclosing the corpus delicti itself under compulsion of the court's order." *Maurice M., supra,* 550 A.2d at 1141 (footnote omitted). However, the majority mistakenly combined the minimally testimonial and nonincriminating evidence that may result from respondent's act of production with the incriminating but nonprivileged evidence that may be contained upon the body of Maurice to find a single Fifth Amendment violation.

[19]"The act of production will not be incriminating . . . unless the suspect's capacity to perform the task compelled is a relevant and unresolved issue, because only then can the suspect reasonably

Moreover, in evaluating the true incriminatory potential of respondent's implied assertions to determine whether they are constitutionally protected, it is necessary to consider yet another factor — society's compelling interest in protecting children in jeopardy of serious injury. Indeed, such considerations of public policy have been integral aspects of several of this Court's Fifth Amendment decisions. In *Byers, supra,* 402 U.S. 424, for example, Chief Justice Burger stated that:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminatory potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. *Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.*

Id. at 427 (emphasis added).

In *Byers,* the Court considered whether compliance with a statute requiring a driver to stop and furnish his name and

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apprehend danger from performing the task compelled." Geyh, *supra,* at 642. Thus, for example, in *Gilbert, supra,* 388 U.S. 263, although the compelled act of producing the handwriting exemplar arguably had minimal testimonial aspects in that the act acknowledged that Gilbert could write, that testimonial communication would not be incriminating unless his ability to write was in issue, *e.g.*, if his defense to the bank robbery charge against him was that he was illiterate and thus could not have written the note demanding money. Geyh, *supra,* at 639-40. Similarly here, respondent's arguably testimonial acknowledgment that she has control over Maurice would be incriminating only if the fact were in issue, *e.g.*, if the charge against her were kidnapping and part of her defense was that she did not have possession of the child.

address after involvement in an automobile accident which results in property damage infringes the privilege against self-incrimination. The Court found that the privilege was not infringed by compliance with this essentially regulatory and noncriminal statute, where self-reporting is indispensable to its purpose, the requirement is addressed to the "public at large" rather than a "highly selective group inherently suspect of criminal activities," and the potential for incrimination is not substantial. *Id.* at 430-31. *See also Albertson* v. *SACB*, 382 U.S. 70 (1965) (order requiring registration by members of a Communist organization violated the Fifth Amendment privilege); *United States* v. *Sullivan*, 274 U.S. 259, 263-64 (1927) (extension of the privilege to cover mandatory filing of income tax returns amounted to "an extreme if not extravagant application of the Fifth Amendment"). The *Byers* Court recognized that:

> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the contents of products, on the wages, hours, and working conditions of employees. . . . Comparable examples are legion.
>
> In each of these situations there is some possibility of prosecution — often a very real one — for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be a "link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

Byers, 402 U.S. at 427-28 (footnote omitted).[20]

Surely, "[p]rotecting infants from child abuse . . . rank[s] in order of societal importance with the regulation and prevention of traffic accidents." *Bouknight*, *supra*, 109 S.Ct. at 573 (Rehnquist, J., Circuit Justice). Recognizing a Fifth Amendment privilege on behalf of parents who refuse to produce their previously abused children would have a catastrophic effect on state child protection services. It would leave the state with no means of assessing compliance with orders of protective supervision and no way of observing the physical and mental well-being of the child. Under the holdings of this Court, "the strong policies in favor of a disclosure called for by [orders] like the one challenged here" cannot be defeated by "the mere possibility of incrimination." *Byers*, *supra*, 402 U.S. at 428.

In these circumstances, the privilege against self-incrimination may not be invoked unless "the compelled disclosures will themselves confront the claimant with 'substantial hazards of self incrimination.'" *Byers*, *supra*, 402 U.S. at 429. The test for meeting the "substantial hazards" requirement was set forth in *Byers*, in reliance on this Court's

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[20]More recently, in *Braswell* v. *United States*, 108 S.Ct. 2284 (1988), the Court held that the custodian of corporate records could not resist a subpoena for those records on the ground that the testimonial aspects of the act of production would incriminate him in violation of his Fifth Amendment privilege. In so holding, the Court once again noted the strong public policy concerns motivating its decision:

> [R]ecognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the government's efforts to prosecute "white-collar crime," one of the most serious problems confronting law enforcement authorities.

Id. at 2294 (footnote omitted).

holdings in *Haynes* v. *United States*, 390 U.S. 85 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Albertson, supra*, 382 U.S. 70; and *Sullivan, supra*, 274 U.S. 259:

> In all of [the cases in which the Court found that compliance with the statutory disclosure requirements would confront the petitioner with "substantial hazards of self-incrimination"] *the disclosures condemned were only those extracted from a "highly selective group inherently suspect of criminal activities" and the privilege was applied only in "an area permeated with criminal statutes" — not in "an essentially noncriminal and regulatory area of inquiry."*

Byers, supra, 402 U.S. at 430 (emphasis added).

These are *not* the circumstances of the present case. Although the requirements of the Maryland Juvenile Causes Act, Md. Cts. & Jud. Proc. Code Ann. § 3-801 *et seq.* (1984), may be directed at a "selective group," *i.e.*, a child's parents, guardians or custodians, certainly it cannot be argued that this group is "inherently suspect of criminal activities." Moreover, just as the reporting requirement in *Byers* "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents," *Byers, supra*, 402 U.S. at 430, a civil contempt order directing the mother of a previously abused child to produce that child before the juvenile court "is not essentially criminal in nature and aims primarily in securing the safety of the child," not the prosecution of the parent. *Bouknight, supra*, 109 S.Ct. at 573 (Rehnquist, J., Circuit Justice).[21]

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[21] *See, e.g., In re Ryan M.*, 513 A.2d 837, 841 (Me. 1986) ("Child protection proceedings are not criminal in nature, but are civil proceedings where the state, as parens patriae, seeks to protect the well-being of the child."); *Custody of Two Minors*, 487 N.E.2d 1358, 1363 (Mass. 1986) ("As parens patriae, the State does not act to punish misbehaving parents but to protect children.").

The Maryland Juvenile Causes Act, Md. Cts. & Jud. Proc. Code Ann. § 3-801 *et seq.* (1984), was enacted to "protect children and promote their best interests." *In re Neil C.*, 521 A.2d 329, 332 (Md. 1987) (CINA petition is not a criminal charge for double jeopardy purposes). It is a civil statute which "limits the court's authority . . . to orders designed to protect the child." *Id.* In order to "protect the child," the Maryland legislature expressly provided the juvenile court with the authority to compel a parent to produce his or her child:

> If a parent, guardian or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.

Md. Cts. & Jud. Proc. Code Ann. § 3-814(c) (1984). Although it certainly is possible that the state will act upon the physical evidence disclosed by the compelled production of a child by investigating — and, where appropriate, prosecuting — a parent suspected of child abuse, "it cannot rationally be suggested that the motive . . . in seeking a court order for the production of [respondent's son] Maurice was to gain evidence for use in a criminal prosecution." *Maurice M., supra*, 550 A.2d at 1149 (McAuliffe, J., dissenting). The purpose behind the order was simply to protect the child.

The majority of the Court of Appeals of Maryland concluded that, "[a]ssuming arguendo, that there may be causes in which a balancing test is appropriate to determine the existence of the Fifth Amendment privilege," the case

before it was not one of them because "the risk of prosecution is so substantial." *Maurice M., supra,* 550 A.2d at 1144. However, as this Court recognized in *Byers*, the "risk of prosecution" is not the issue where mandatory disclosures are required to serve an important societal interest. Rather, the question is whether the "hazards of self-incrimination" resulting from "the compelled disclosures themselves" are substantial. *Byers, supra,* 402 U.S. at 429.

Respondent may indeed face a substantial risk of prosecution if the production of her young child provides physical evidence of child abuse. However, the hazards of self-incrimination flowing from the minimal testimonial aspects of the compelled production clearly are not substantial. Where, as here, "the incriminatory value of the testimonial component is, in light of all the circumstances and known facts, slight, and the statutory mandate for production is strong and deeply rooted in important and traditional state interests, it does no violence to the Fifth Amendment to require the mother to produce the child." *Maurice M., supra,* 550 A.2d at 1149 (McAuliffe, J., dissenting).[22]

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[22]In circumstances comparable to the present case, a number of state courts have rejected an overly expansive view of the Fifth Amendment privilege when the safety of a child is at stake. In *People* v. *Salinas,* 182 Cal.Rptr. 683 (Cal.App. 1982), for example, the court found that a physician's need to question a mother suspected of child abuse about her child's injuries outweighed the mother's privilege against self-incrimination:

> In balancing the interests of the child's well-being, particularly in an emergency situation where a life is at stake, versus the need for protecting the alleged abuser's right against self-incrimination, we believe there is no question that the former interest outweighs the latter. "Any other policy would reflect an indifference to human life."

Id. at 692 (citations omitted). *See also In re Welfare of J.W. and A.W.,* 391 N.W.2d 791, 795 (Minn. 1986), *cert. denied sub nom. Minor* v. *Bureau of Social Services,* 479 U.S. 1040 (1987) (discovery sanctions in dependency and neglect hearing that deemed central issues, which parents refused to answer on Fifth Amendment grounds, admitted, were constitutionally valid where "[t]he safety and well-being of [the children] are at issue . . . perhaps even their lives."); *In re Vance A.,* 432 N.Y.S.2d 137, 143 (N.Y.C. Fam. Ct. 1980) ("profound considerations of public policy" regarding the welfare of the child justify conclusion that mother's privilege against self-incrimination would not be violated by civil proceedings on child abuse petition during pendency of criminal proceedings against her in connection with death of another child).

In sum, however incriminating the evidence derived from examination of respondent's young child may be, the act of producing him — the only thing respondent is compelled to do — would not involve testimonial self-incrimination. *Fisher, supra,* 425 U.S. at 411. Thus, she may not use the Fifth Amendment as a weapon with which to prevent the state from protecting the child. Were she allowed to do so, it would indeed be the "extreme if not . . . extravagant application of the Fifth Amendment" that Justice Holmes warned against. *Sullivan, supra,* 274 U.S. 259, 263-64.

II.

EVEN IF RESPONDENT'S COMPELLED PRODUCTION OF HER CHILD COULD IMPLICATE THE FIFTH AMENDMENT PRIVILEGE, SHE HAS WAIVED THE PRIVILEGE BECAUSE SHE IMPLICITLY AGREED TO PRODUCE HER CHILD, TESTIFIED AS TO HIS WHEREABOUTS, AND KNOWINGLY DECEIVED THE COURT.

Even if producing her child could implicate the Fifth Amendment privilege against self-incrimination, respondent has waived the privilege. Like other evidentiary privileges, the Fifth Amendment may be waived where a witness fails

to invoke the privilege in a timely manner or where her words or conduct evidence waiver. *See, e.g., Tollett* v. *Henderson,* 411 U.S. 258 (1973); *United States* v. *Murdock,* 284 U.S. 141, 148 (1931). Respondent has waived her privilege through both her words and her actions.[23]

Respondent has waived her privilege in three ways. First, respondent waived any privilege she might assert by voluntarily, with the advice of competent counsel, entering into an Order of Protective Supervision with DSS. Under this Stipulation and Order, signed by counsel on August 18, 1987, respondent was given physical custody of Maurice in exchange for her future cooperation with DSS. *Maurice M., supra,* 550 A.2d at 1136. Among other things, respondent agreed to attend parenting classes, utilize the assistance of a parent aide provided by DSS and refrain from physically punishing Maurice. *Id.* Implicit in this agreement is the obligation to produce the child when so requested by DSS. DSS has upheld its part of the bargain by granting respondent custody of Maurice. Respondent cannot now claim that she is not obligated to comply with the agreement.

In an analogous case, the custodian of corporate books was held to have waived his privilege against production of the records. *Curcio* v. *United States,* 354 U.S. 118 (1957). "By accepting custodianship of the records he has voluntarily assumed a duty which overrides his claim of privi-

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[23]Effective waiver of a constitutional right generally requires a voluntary and intentional abandonment of the right. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) (constitutional right to assistance of counsel may be waived by knowing and intelligent waiver). The determination of whether there has been an intelligent waiver depends upon the facts and circumstances of each case. *Id.* at 464. Since respondent was assisted by competent counsel at all relevant times during the lower court proceedings, it can be assumed that her words and her actions were knowing and intelligent.

lege . . . with respect to the production of the records themselves." *Id.* at 124-25.[24] Similarly here, having voluntarily assumed conditional custody of her child from the state, respondent has waived her Fifth Amendment privilege with respect to the production of the child.

Second, when respondent appeared in court on April 27, 1988, she voluntarily told the court of her son's alleged location with her sister in Texas. *Maurice M., supra,* 550 A.2d at 1137. She failed, at that time, to invoke her privilege against self-incrimination even though she was once again assisted by competent counsel. *Id.*

> Unless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony he deems to be incriminating. Only the witness knows whether . . . the disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege.

Garner v. *United States,* 424 U.S. 648, 655 (1976) (taxpayer charged with gambling offense held to have no privilege against self-incrimination where incriminating disclosures were made on his tax returns). Respondent's assertion of the privilege was not timely made. Having explicitly testified about her son's whereabouts, she has waived any privilege against self-incrimination as to the matter of his location.

This Court previously has recognized prohibitions against the selective release of information. For example, in *Rogers* v. *United States,* 340 U.S. 367 (1951), the witness volunta-

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[24]*See also Braswell* v. *United States, supra,* 108 S.Ct. at 2292 (corporate custodian of books assumes an obligation with respect to the books that forecloses any exercise of the privilege against self-incrimination with respect to their production).

rily testified as to certain facts about her involvement with the Communist Party. The Court held that such incriminating testimony precluded her from claiming a Fifth Amendment privilege as to the location of Party documents. *Id.* at 374. The Court reasoned that "[t]o uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." *Id.* at 371. For the privilege to apply after *some* incriminating testimony has been given by the witness, the information sought must *further* incriminate the witness. *Id.* at 374.

Assuming, arguendo, that the information sought from respondent is both testimonial and incriminating, it is difficult to imagine that her answers to the very same questions she voluntarily answered the previous day could possibly incriminate her further. Her "assertion of [the privilege] here is evidently an afterthought." *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927) (alien waived privilege against self-incrimination where, under immigration panel's questioning, he remained silent and did not assert the Fifth Amendment privilege until the end of the hearings).

Finally, respondent's false statements to the court regarding her son's location in Texas evidence an intent to mislead the court, an abuse of the judicial system resulting in waiver of the privilege. In *Klein* v. *Harris*, 667 F.2d 274 (2d Cir. 1981), the court stated that waiver can be found where "a witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth" and where the witness had reason to know that those statements might be interpreted as waivers. *Id.* at 287.[25] Respondent certainly "distorted" the

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[25]*See also United States* v. *St. Pierre*, 132 F.2d 837 (2d Cir. 1942), *cert. dismissed as moot*, 319 U.S. 41 (1943) (recognizing special interest in truthfinding and suggesting that privilege against self-incrimination should not be available if partial testimony has endangered an accurate determination of fact).

truth. Moreover, since her statements were made with advice of counsel, she had "reason to know" that they might be interpreted as waivers. Since respondent has knowingly deceived the court as to Maurice's whereabouts, she has waived any Fifth Amendment privilege she may have had against disclosure of his location.[26]

* * *

Amicus JPA fervently believes that it would be a "sad commentary upon American life, and constitutional principles — so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all,' " *DeShaney*, *supra*, 109 S.Ct. at 1013 (Blackman, J., dissenting), if the Constitution were held today to be a barrier preventing the state from saving this child.

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[26]In an analogous line of cases regarding contradictory evidence, this Court has held that a defendant's testimony can be impeached through the use of illegally obtained contradictory evidence even though that evidence cannot be used directly to prove his guilt. *See, e.g., United States* v. *Havens*, 446 U.S. 620 (1980) (defendant's testimony was impeached by admitting illegally seized evidence of drug dealing); *Harris* v. *New York*, 401 U.S. 222, 225 (1971) (stating that the "privilege cannot be construed to include the right to commit perjury," the Court admitted for purposes of impeachment, a statement which otherwise would have been inadmissible due to lack of *Miranda* safeguards).

CONCLUSION

For the reasons stated above, *amicus curiae* Juvenile Protective Association respectfully requests that the judgment of the Court of Appeals of Maryland be reversed.

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BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER,
v.
JACQUELINE BOUKNIGHT,
RESPONDENT.

MAURICE M.,
PETITIONER,
v.
JACQUELINE BOUKNIGHT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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Nos. 88-1182, 88-6651

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,
v.
JACQUELINE BOUKNIGHT,
Respondent,

MAURICE M.,
Petitioner,
v.
JACQUELINE BOUKNIGHT,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, AND OF THE STATES OF ALASKA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, SOUTH CAROLINA, VERMONT, VIRGINIA, WEST VIRGINIA, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The States identified above submit this brief amici curiae in support of petitioner. The States have a compelling interest in protecting

children from abuse and neglect. To serve that interest, the States have created departments or agencies to receive reports of suspected abuse or neglect, to conduct investigations, and to provide protective services to children and families.[1/]

On the basis of their experience, amici have come to the conclusion that the direct access of these agencies to suspected victims of child abuse or neglect is crucial to the effectiveness of their efforts to protect such children. In most cases amici must depend for such access on the cooperation, whether voluntary or

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1/ See, e.g., Mass. Gen. L. ch. 119, §§ 51A-B; 29 Del.C. ch. 90. See also DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1010-11 (1989) (Brennan, J., dissenting) (describing Wisconsin statutory scheme); Darryl H. v. Coler, 801 F.2d 893, 895-96 (7th Cir. 1986) (describing Illinois statutory scheme and practice).

compelled, of the child's parents or other custodians. For the reasons set forth, infra, amici believe that affirmance by this Court of the judgment below would drastically impair their ability to provide protection for children in jeopardy.

SUMMARY OF ARGUMENT

I. The States have a compelling interest in protecting children. That interest is effectuated through non-criminal statutory schemes which require child protection agencies, such as a Department of Social Services (hereafter, "DSS"), to determine whether the child's health or safety is in immediate danger. See pp. 11-13, infra. The expressed and practical purpose of these statutory schemes is protective, not penal. See pp. 14-17 infra.

The most efficient and effective tool that a child protection agency has to investigate cases of suspected child abuse is direct visual observation. Direct observation enables the investigator to determine quickly and accurately whether the physical evidence supports a report of abuse, and whether the child is in immediate danger. After the initial investigation, direct observation also permits effective monitoring of the child's continued well-being. See pp. 18-21, infra.

Child protection agencies depend upon the cooperation, either voluntary or compelled, of the child's custodian in order to undertake a visual observation of the child. See pp. 21-23, infra.

One of the tools that child protection agencies find instrumental to

overcome the resistance of non-cooperative parents is the ultimate threat of a court order to produce the child. It is the collective view of child protective agencies that the very availability of a court order, and the attendant contempt power of the court, contribute to the agencies' ability to persuade most parents to permit access voluntarily. In a small percentage of cases, of course, actual resort to a court order is necessary. See pp. 23-25, infra.

If this Court affirms the judgment below, the States' ability to gain access to children in situations of jeopardy will be impaired, with potentially life-threatening consequences to those children. See pp. 25-27, infra.

II. The Fifth Amendment is not violated by the compelled compliance

with an order to produce the child, because the act of production is not testimonial. Rather, the order merely requires the respondent to become a source of what may become real or physical evidence. See pp. 27-29, infra.

The order to produce the child physically is not the same as an order to disclose his whereabouts. See pp. 30-32, infra. The only arguably testimonial components of the respondent's production of the child would be the acknowledgement that the child is Maurice (the subject of the child protection proceeding) and that the respondent has sufficient control over him to produce him. But these communications are self-evident "foregone conclusions" which do not rise to the level of testimony within the protection of the Fifth Amendment. See pp. 32-33, infra.

Production of the child is not the equivalent of production of the corpus delicti. In contrast to an order to produce something the possession of which is a crime itself (such as cocaine, or a forged alien registration card), here the order to produce is essentially neutral, and the aim of the order is to assure the child's protection, not to secure evidence. See pp. 33-36, infra.

The Maryland Court of Appeals erred when it concluded that production of the child was testimonial because it may lead to incriminating evidence of child abuse. If production is not testimonial, and therefore is unprotected by the privilege, it does not become testimonial merely because it may lead to incriminating evidence. Compelling production of the child for

examination is no different from requiring an individual to make himself available for a blood alcohol test, or to give a handwriting or voice exemplar, or to stand in a line-up. See pp. 36-37 infra.

Further, the respondent has refused to produce Maurice, but has never asserted that she cannot produce him. Where the act is nontestimonial, punishment for the refusal to act violates no Fifth Amendment right. See pp. 37-38, infra.

III. Assuming arguendo that the production of the child is "testimonial," then this Court should recognize the compelling societal interest in protecting children and tip the balance between the respondent's rights and the child's rights in favor of protecting the child in jeopardy. See pp. 40-42, infra. The statutory

scheme is not directed at a "highly selective group inherently suspect of criminal activities." Rather, it is primarily protective, not penal, in purpose. See pp. 44-47, infra. Thus, the compelling interest in favor of production outweighs whatever limited incriminating effect production of the child might cause for the parent or custodian. See pp. 47-48, infra.

IV. The extension of immunity from prosecution to a recalcitrant parent is not an acceptable solution to the States' need to protect children in this kind of situation. The States should not be required to choose between protecting children and punishing their abusers. Child abusers should not be able to extract immunity in exchange for production: the incentive to hide the child would become too great. See pp. 48-49, infra.

Moreover, the extension of immunity would not guarantee cooperation by the parent or custodian and expeditious access to the child. If granted use immunity, the parent or custodian might refuse to cooperate for fear that a prosecution may follow in any event on the basis of information from independent sources. If granted transactional immunity, the parent or custodian, recognizing she has full immunity, might give incomplete or misleading information. See pp. 49-52, infra.

Immunity, whether use or transactional, does not, as a practical matter, ensure cooperation. There may be other reasons the parent or custodian is not cooperating: fear of reprisal; fear of losing parental rights; or fear of personal disgrace. See pp. 52-54, infra.

Finally, immunity may not always be available under state law and, if available, may be difficult to obtain. In child abuse cases, child protection agencies must be able to move promptly to ensure that children at risk are protected. See pp. 54-57, infra.

For these reasons, the judgment of the Maryland Court of Appeals must be reversed.

ARGUMENT

I. THE STATE'S INTEREST IN PROTECTING CHILDREN FROM ABUSE AND NEGLECT MAKES PHYSICAL ACCESS TO CHILDREN AT RISK A NECESSITY.

Child abuse and neglect is a severe and widespread problem affecting large numbers of children. See generally Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986). Incidents of suspected abuse or neglect are reported

to child protection agencies at annual rates in the tens of thousands.[2/]

2/ For example, during 1987, the Massachusetts Department of Social Services received reports of suspected abuse or neglect of 52,391 children. Reports regarding 68% of these children, or 33,832 children, were "screened in" (see Mass. Regs. Code tit. 110 § 4.21 (1988): reports are "screened out" where the perpetrator is not a caretaker; where the alleged acts of abuse took place too long ago; or where the report has been determined unreliable) and investigated. These investigations resulted in determinations that allegations of abuse or neglect were "substantiated" with respect to 17,399 children, or 51% of the children investigated (see Mass. Regs. Code tit. 110 § 4.03 (13) (1987): substantiated means "to find that there is some credible evidence of a reportable condition." In 1988, the Massachusetts DSS amended the word "substantiated" to "supported," which term means "that the Department has reasonable cause to believe that an incident of abuse or neglect by a caretaker did occur." Mass. Regs. Code tit. 110 § 4.32 (2)). 2477 of the 17,399 children, or 5% of the children reported, required emergency intervention. (Child Abuse/Neglect Statistics, January 1 - December 13, 1987, Prepared by Antone C. Felix III, Massachusetts DSS Research Evaluation and Planning Unit, April 1988, on file with Massachusetts DSS.)

Victims of child abuse or neglect suffer physical, mental, or emotional harm, not infrequently including death. See Darryl H. v. Coler, 801 F.2d at 902 ("[i]n 1982, seventy-one children in Illinois died as a result of child abuse");[3/] see, e.g., DeShaney v. Winnebago County DSS, 109 S.Ct. 998 (1989) (child permanently brain-injured from parental abuse). As this Court observed in Wyman v. James, 400 U.S. 309, 318 (1981), "there is no more worthy object of the public's concern" than the care and protection of children.

3/ According to records of the Massachusetts DSS, in the first five months of fiscal year 1989 as many as fifteen children may have died in the Commonwealth as a result of abuse inflicted by their caretakers. (Monthly Report on Chapter 288 Legislation (D.A. Reporting Bill), November 1988 (on file with Massachusetts DSS).

The compelling State interest in protecting children is primarily effectuated through non-criminal statutory schemes. The statutes governing child protection agencies' efforts reflect their purpose to protect children, and the importance the States ascribe to that purpose. Massachusetts law is illustrative. The stated purpose of the Massachusetts statutory scheme "is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, . . . inability or unfitness. . . to provide care and protection for their children." Mass. Gen. L. ch. 119 § 1.

Mass. Gen. L. ch. 119, § 51A requires certain professionals, and permits any person, to make reports to DSS upon "reasonable cause to believe" that a child is suffering from abuse or neglect. Upon receiving such a report, DSS must determine whether it has reasonable cause to believe that the child's health or safety is in immediate danger. If so, it must commence its investigation within two hours and complete it within twenty-four hours; otherwise, DSS must commence its investigation within two days and complete it within ten days. Mass. Gen. L. ch. 119, § 51B(1). The investigation "shall include a home visit at which the child is viewed, if appropriate." Id. If the investigation discloses "reasonable cause to believe that the removal of the child is necessary to protect him from further abuse or

neglect," DSS may take the child into its custody immediately. Mass. Gen. L. ch. 119, § 51B(3). In other cases, DSS may petition a court for an order placing the child in its custody. Mass. Gen. L. ch. 119, § 24.

To be sure, the States also have an interest in prosecuting as criminal acts at least the more serious forms of child abuse.[4/] However, statistics show that the expressed protective purpose[5/]

4/ For that reason, in Massachusetts for example, DSS must, by statute, refer to prosecutorial authorities certain criminal conduct that comes to its attention. See, e.g., Mass. Gen. L. ch. 119, § 51B(4) (requiring report where child has died; has been sexually assaulted or exploited; or has suffered brain damage, loss or substantial impairment of bodily function or organ, or has been disfigured).

5/ See Mass. Gen. L. ch. 119, § 1, quoted at p. 14, supra.

of the statutory scheme is paramount. For example, in Massachusetts, DSS records indicate that DSS makes reports to district attorneys regarding only about 7.3% of all the children about whom it receives reports of abuse or neglect. Approximately 95% of those cases involve sexual, rather than physical abuse. The proportion of physical abuse cases referred to prosecutors is extremely small. (See note 2, supra.) Thus, as the governing statutes indicate, e.g., Mass. Gen. L. ch. 119, § 1, and as statistics show, the child protection agencies' overriding purpose, and the focus of their efforts, is not to punish parents for past crimes against their children, but to protect the child victims from further harm.

In the course of performing their child protective functions, the child protection agencies have developed substantial expertise in the investigation of suspected child abuse and neglect. From their accumulated experience, these agencies have come to the unanimous view that direct visual observation of the child is a crucial aspect of every child protective investigation.[6/] The implications of the decision of the Maryland Court of

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6/ Because of the widely recognized importance of examining the child, some child protection agencies have promulgated regulations requiring that every investigation include examination of the child. For example, the Massachusetts regulations require a visual examination in every case, and, in fact, make it the "first priority" in an emergency case. Mass. Regs. Code tit. 110, § 4.26(1) (1988). See also Child Abuse and Neglect Investigations Handbook of the Illinois Department of Children and Family Services, noted in Darryl H., 801 F.2d. at 896.

Appeals would be to prevent a child protection agency from effectively investigating many serious instances of alleged abuse. This conclusion is consistent with "common sense alone[;] . . . there is no quicker way of knowing whether a child is at grave risk than by an actual examination of the child." Darryl H., 801 F.2d at 899 (quoting District Court finding).

Direct observation of a reportedly abused or neglected child enables the investigator to gauge the child's overall condition and demeanor, to detect bruises or other physical evidence of abuse, and to evaluate the child's nutritional status and hygiene. By these methods, the investigator can determine, as quickly and accurately as possible, whether physical evidence supports the report, and whether the child is in immediate danger. See Id.;

Bourne & Newberger, "Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect, 57 B.U.L. Rev. 670, 704 (1977).

The importance of viewing the child does not depend on the nature or severity of the mistreatment reported. As child protection agencies have learned from repeated experience, the most severe instances of child abuse sometimes come to their attention through reports of neglect. Not infrequently, investigators discover an urgent need for intervention only upon observing a reportedly neglected child who exhibits physical evidence indicating life-threatening abuse.

Beyond the investigative stage, once a child is identified as having suffered abuse or neglect, it is obvious that any effort to protect that child from

further harm depends on access to the child. Effective monitoring of the child's continued well-being within the family requires repeated direct observation. Further, when a child must be removed from the family, the removal itself necessarily requires physical access.

On the basis of their experience, child protection agencies have come to the firm and unanimous conclusion not only that their direct access to victims of child abuse or neglect is crucial to the effectiveness of their efforts to protect such children, but also that in most cases they must depend for such access on the cooperation (whether voluntary or compelled) of the child's parents or other custodians. In the agencies' experience, their access to a child almost always depends on the

actions of the child's parent or other custodian. While access may at times be gained at the child's school, day care center, or the like, or through a search of the child's home or some other location where the child is known to be, these methods cannot substitute for parental cooperation. A parent's control over a minor child, particularly in the early years, enables the parent to move the child from the home, to secrete the child away from any place that authorities might search, and thus to thwart efforts to locate the child. This very case vividly illustrates the practical power of a parent determined to hide a child from authorities.

In most cases, parents voluntarily permit the child protection agency access to their children, both during investigations and in connection with

ongoing protective services.[7/] Resistance occurs frequently enough, however, that child protection agencies have adopted tools for responding to it. The agencies' principal tool is persuasion, either by their own personnel, or at times by police. Where necessary, however, the agencies may resort to seeking court orders compelling access. The ultimate availability of such orders, the agencies believe, contributes substantially to their ability to persuade most parents or custodians to permit access voluntarily.

Massachusetts law and practice illustrate a typical child protection

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7/ The protective service agreement between the parties in this case, as quoted at p. 2 of Respondent's Brief in Opposition to the Petition for Writ of Certiorari, is typical of service agreements employed by child protection agencies and approved by courts daily.

agency's approach. By regulation, an investigator faced with a parent's refusal of access to the child may first seek police aid, and may consider invoking a judicial remedy. Mass. Regs. Code tit. 110, §§ 4.26(3), 4.27(3) (1988). Under Mass. Gen. L. ch. 119, § 24, a court receiving a petition for the care and protection of a child "may issue a precept to bring such child before said court." In practice, these precepts are fulfilled by the child's parents or custodians, after being served on them by a police officer or social worker. However, Massachusetts courts have consistently relied on the ultimate possibility of resort to the contempt power to compel compliance with these orders. In the experience of the Massachusetts DSS, the existence of this mechanism to compel access not only

provides a means of last resort, but also tends to induce voluntary cooperation.

If affirmed, the decision of the Maryland Court of Appeals would significantly impair the States' ability to protect children. Precisely because acts constituting child abuse or neglect are also frequently criminal acts, the analysis employed by the Court of Appeals of Maryland has dramatic negative implications for the protection of children.

In any case of abuse or neglect, the child's physical condition may supply evidence of crime, as well as evidence of the child's need for protection. Thus, under the Maryland Court's analysis, any parent or custodian who has committed -- or who might be suspected of -- a crime involving child abuse or neglect has a constitutional

right to refuse to produce the child for examination, even in the absence of any criminal investigation or prosecution. That right, as defined by the Maryland Court, would prevail over the child's need for protection, no matter how urgent, and would constitute an absolute defense to non-compliance with a court order requiring production of the child.

Under the Maryland Court's ruling, child protection agencies would be deprived of any means to compel access to children in need of protection, as well as of a significant tool in their efforts to induce voluntary cooperation. Amici believe that that result would significantly impair the agencies' ability to protect large numbers of children in situations of severe jeopardy, with potentially life-threatening consequences to those

children. That result is legally and morally unacceptable.

II. THE RESPONDENT MAY PROPERLY BE HELD IN CONTEMPT FOR FAILURE TO PRODUCE THE CHILD BECAUSE THE ACT OF PRODUCING THE CHILD IS NOT A TESTIMONIAL COMMUNICATION.

The privilege against self-incrimination is an exception to the rule that citizens have a social obligation to come forward with evidence. Miranda v. Arizona, 384 U.S. 436, 477-78 (1966); see also Branzburg v. Hayes, 408 U.S. 665, 688 (1972). Unless the Fifth Amendment privilege applies, the respondent here "no less than any other citizen is obliged to assist the authorities." Roberts v. United States, 445 U.S. 552, 558 (1980); see also United States v. Washington, 431 U.S. 181, 189 (1977).

The Fifth Amendment's mandate that no person "shall be compelled in any

criminal case to be a witness against himself" protects only against compelled,[8/] testimonial communications that are incriminating. Fisher v. United States, 425 U.S. 391, 409 (1976); see also Doe v. United States, ("Doe II") 108 S.Ct. 2341, 2346 (1988).

The Fifth Amendment is not violated by the order to produce the child, because the act of producing Maurice would not be testimonial; by producing him, the respondent would not be a witness, but only a source of "real or physical evidence." See Schmerber v. California, 384 U.S. 757, 764 (1966). An order to produce Maurice is analogous to an order to submit to a blood test, Schmerber, 384 U.S. at 764-65; to stand

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8/ There is no question that the contempt judgment below and the commitment imposed thereon constitutes compulsion. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

in a line-up and speak words used by a robber, United States v. Wade, 388 U.S. 218, 222-23 (1967); to provide a handwriting exemplar, see Gilbert v. California, 388 U.S. 263, 265-66 (1967); to provide a voice exemplar, United States v. Dionisio, 410 U.S. 1, 5-7 (1973); to provide items of clothing, Warden v. Hayden, 387 U.S. 294, 302 (1967); to wear certain clothing, Holt v. United States, 218 U.S. 245, 253 (1910); to surrender a passport, United States v. Friedman, 593 F.2d 109, 118 (9th Cir. 1979); and to produce business records, United States v. Doe, 465 U.S. 605, 612 (1984) ("Doe I"). Compelled performance of these acts does not violate the Fifth Amendment because none of these acts requires the subject of the compulsion order "to speak his guilt." Wade, 388 U.S. at 222-23.

Physical production of the child must be distinguished from disclosure of his whereabouts. Compelling his production is like being forced to surrender a key to a strong box containing possibly incriminating documents but is unlike being "compelled to reveal the combination to [a] wall safe. (citation omitted)." Doe II, 108 S. Ct. at 2347 n.9. This "bifurcated approach," New York v. Quarles, 467 U.S. 649, 668 (1984) (O'Connor, J., concurring) to real and testimonial evidence is well established.[9/] Indeed, it has been

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9/ In Schmerber, 384 U.S. at 765 n.9, the Court distinguished between the results of blood tests themselves (the physical evidence) and "any testimonial products of administering the test -- products which would fall within the privilege." (emphasis original). See also Wade, 388 U.S. at 223 (Court distinguishing between the line-up identification procedure itself and what was said at the procedure); Michigan v. Tucker, 417 U.S. 433, 445 (1974) (Court

(footnote continued)

suggested that physical evidence such as a gun, discovered as a result of an improperly "compelled" (in the Miranda[10/] sense) testimonial

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(footnote continued)

distinguishing between the testimony of an alibi witness identified by the defendant before defendant had received complete Miranda warnings, and the defendant's own statements); Wilson v. United States, 221 U.S. 361, 377 (1911) (Court distinguishing between corporate records and oral testimony from defendant); Doe II, 108 S.Ct. at 2347 n.9 and at 2348 n.10 ("the Schmerber line of cases does not draw a distinction between unprotected evidence sought for its physical characteristics and protected evidence sought for its content. Rather, the court distinguished between the suspect's being compelled himself to serve as evidence and the suspects's being compelled to disclose or communicate information or facts that might serve or lead to incriminating evidence.")

10/ Miranda v. Arizona, 384 U.S. 436 (1966).

response (as to the location and ownership of the gun), is nonetheless, and as distinct from the testimonial aspects of the response, admissible. Quarles, 467 U.S. at 665, 667 (O'Connor, J., concurring); but see Commonwealth v. Hughes, 380 Mass. 583, 592, 404 N.E.2d 1239, 1244, cert. denied, 449 U.S. 900 (1980). Under this analytically sound approach, compliance with the order to produce Maurice would not be testimonial.

The only "contents of [her] own mind," Curcio v. United States, 354 U.S. 118, 128 (1957), that the respondent arguably might be compelled to communicate by complying with the order to produce Maurice would be the acknowledgement that the child is Maurice and that the respondent has sufficient control over him to produce him. See Doe II, 108 S.Ct. at 2347; Braswell v. United

States, 108 S.Ct. 2284, 2288 (1988); Doe I, 465 U.S. at 614 n.13. However, because respondent is Maurice's parent, and because she has legal custody of him (which is already the subject of state involvement)[11/] these arguably implicit testimonial communications are self-evident "foregone conclusions" and therefore have "minimal testimonial significance," Fisher, 425 U.S. at 411-12, which do not rise to the level of "testimony" within the protection of the Fifth Amendment. Id. at 410-13; see also United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir. 1977), and cases cited.

The Maryland Court of Appeals erred in concluding that production of the child was "testimonial" because it would amount to production of the "corpus

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11/ In re Maurice M., 314 Md. 391, 550 A.2d 1135, 1136 (1988).

delicti." In re Maurice M., 314 Md. 391, 550 A.2d 1135, 1141 (1988). Contrary to the Court's suggestion, the order to produce the child was not an order to produce "the crime itself." United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970) (forged alien registration receipt card) aff'd, 404 U.S. 293 (1971); cf. State v. Dennis, 16 Wash. App. 417, 558 P.2d 297 (1976) (cocaine); State v. Alexander, 281 N.W.2d 349 (Minn. 1979) (obscene film); Hughes, 380 Mass. at 592, 404 N.E.2d at 1244 (defendant licensed to own firearm could not be compelled to produce it for ballistics test).[12/]

12/ In fact, in Campos-Serrano, the Court distinguished between the first, non-criminal, immigration inquiry whether the defendant was lawfully in the country, which inquiry did not violate the defendant's Fifth Amendment privilege, and the second inquiry for "the crime itself," the forged cards that had previously been examined.

Rather, the order to produce the child was an essentially neutral request. Cf. United States v. Sullivan, 274 U.S. 259, 263-64 (1927) (requirement to file income tax return is neutral on its face); California v. Byers, 402 U.S. 424, 430-31 (1971) (requirement to report automobile accident is neutral on its face). The primary aim of the order to produce was not to secure evidence for a criminal prosecution[13/] but to assure protection of a child pursuant to an order that required the respondent not to abuse the child and to cooperate with the petitioner Department of Social

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13/ cf. Hughes, 380 Mass. at 591-92, 404 N.E.2d at 1244 (order to produce gun for ballistics test); Albertson v. SACB, 382 U.S. 70, 79 (1965) (statute requiring registration as member of Communist Party); Haynes v. United States, 390 U.S. 85, 96-97 (1968) (statute requiring registration of firearms); Leary v. United States, 395 U.S. 6, 18 (1969) (statute imposing tax on transfers of marijuana).

Services, In re Maurice M., 550 A.2d at 1136-37. Cf. Byers, 402 U.S. at 432 (disclosure of name and address of driver involved in accident is an essentially neutral act); Shapiro v. United States, 335 U.S. 1, 32 (1948) (defendant's records used to prosecute him for violation of Price Control Act), reh'g denied, 335 U.S. 836 (1948); Sullivan, 274 U.S. at 263-64 (filing of tax returns required even though it might reveal violations of Prohibition Act; it would "be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime"). Thus, the incidental possibility of self-incrimination is not enough to excuse non-compliance with the order to produce.

The Maryland Court of Appeals also erred in concluding that the production of the child was testimonial because it might reveal that Maurice has been subject to criminal abuse or is dead. See In re Maurice M., 550 A.2d at 1141. Because the compelled production is "not testimonial and for that reason not protected by the privilege, it cannot become so because it [may] lead to incriminating evidence." Doe II, 108 S.Ct. at 2346 n.6, quoting In re Grand Jury Subpoena, 826 F.2d 1166, 1172 n.2 (2d Cir. 1987) (concurring opinion), cert. denied sub nom. Coe v. United States, 108 S.Ct. 2870.

That an examination of Maurice might yield incriminating evidence of child abuse does not transform the nontestimonial quality of the act of production into a testimonial

communication. See Doe II, 108 S.Ct. at 2346 n.6. Respondent's making Maurice available for examination is no different from an individual's making himself available for a blood-alcohol test. The government would still be required to locate evidence of criminality "by the independent labor of its officers." Doe II, 108 S.Ct. at 2350, quoting Estelle v. Smith, 451 U.S. 454, 462 (1981).

The record indicates that the respondent has never asserted that she would not be able to produce Maurice. To the contrary, she insisted first that Maurice was with an aunt (unidentified) and then that he was with her sister at an address in Texas. In re Maurice M., 550 A.2d at 1137. In essence, the respondent has refused to act. Where the act is nontestimonial, punishment for the refusal to act violates no Fifth Amendment right. See Deering v. Brown,

839 F.2d 539, 541-42 (9th Cir. 1988) (refusal to take blood alcohol test not testimonial); see also South Dakota v. Neville, 459 U.S. 553, 560-61 n.11 (1983) (Court recognizing that the view that refusal to take blood alcohol test is not testimonial has force, but declining to rest its decision that the refusal is admissible on that basis); United States v. Toussie, 410 F.2d 1156, 1160 (2d Cir. 1969) (defendant's privilege against self-incrimination was not violated by his failure to register for selective service on ground he could not register without incriminating himself; defendant's inaction did not give rise to threat of punishment beyond what he already risked), rev'd on other grounds, 397 U.S. 112 (1970); see also Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976) (prison disciplinary board may draw adverse inference from silence); Jenkins

v. Anderson, 447 U.S. 231, 235-36 (1980) (defendant may be impeached with silence).

For the foregoing reasons, the Court of Maryland erred when it concluded that production of the child was testimonial and that the juvenile court could not compel, under penalty of contempt, the respondent to produce him.

III. ASSUMING ARGUENDO THAT PRODUCTION OF THE CHILD IS "TESTIMONIAL," THEN, ON BALANCE, PRODUCTION MAY NONETHELESS BE LAWFULLY COMPELLED BECAUSE THE PUBLIC INTEREST IN PROTECTING CHILDREN IS PARAMOUNT.

A conclusion by this Court that compliance with the order to produce the child would be testimonial and would implicate the respondent's Fifth Amendment right should not necessarily end the Court's inquiry. This Court has long recognized that societal interests must be taken into consideration when determining the proper reach of the

privilege against self-incrimination. See, e.g., Byers, 402 U.S. at 427. Indeed, even in the purely criminal context, this Court has recognized that the "scope of the privilege [does not coincide] with the complex of values it helps to protect," Schmerber, 384 U.S. at 762. Similarly, in refusing to extend the scope of the privilege to corporate record keepers, this Court has recognized that extending the privilege may have a negative impact on the Government's efforts to prosecute crime. See Braswell, 108 S.Ct. at 2294. As this Court has stated:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the

> individual claim to constitutional protections on the other; neither interest can be treated lightly.

Byers, 402 U.S. at 27.

Here, where the primary purpose of the statutory scheme that would permit the taking of a child into custody or an order to produce the child[14/] is to protect children, the balance tips away from the respondent's Fifth Amendment right in favor of protecting the child in jeopardy. Cf. United States v. Vaught, 434 F.2d 124 (9th Cir. 1970) (requiring

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14/ The Maryland trial court had the statutory power of contempt to compel the unwilling custodian to produce the child before the court. See Md. Courts and Judicial Proceedings Code Ann. § 3-814(c) ("If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.")

reporting of amphetamines at customs point), cert. denied, 401 U.S. 976 (1971); Wynn v. United States, 422 F.2d 1245 (9th Cir. 1970) (requiring disclosure of marijuana smuggled into United States); United States v. Flores, 753 F.2d 1499 (9th Cir. 1985) (requiring reporting of intent to ship firearms). See also Quarles, 467 U.S. at 665-66 ("the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"); United States v. Webb, 755 F.2d 382, 392 n.14 (5th Cir. 1985) (failure to give Miranda warnings no bar to admissibility of statements where negotiators' primary purpose was to prevent defendant's threatened suicide), reh'g denied en banc, 762 F.2d 1004 (5th Cir. 1985).

Where the primary purpose of a statutory scheme is not to facilitate criminal convictions, but rather is neutral on its face and is not directed at a "highly selective group inherently suspect of criminal activities," Byers, 402 U.S. at 430, the balance of interest tips in favor of requiring "disclosure." Id.; cf. Shapiro, 335 U.S. at 33; Sullivan, 274 U.S. at 263-64; United States v. Des Jardins, 747 F.2d 499, 508-09 (9th Cir. 1984); United States v. Grotke, 702 F.2d 49 (2d Cir. 1983); United States v. Carlson, 617 F.2d 518 (9th Cir.), cert. denied, 449 U.S. 1010 (1980).

The statutory scheme in this case, which permits a child to be taken into custody and the court to request his production, see n. 14, supra, is not directed at a "highly selective group

inherently suspect of criminal activities." Byers, 402 U.S. at 430. Although the request to produce the child is directed at "a parent, guardian or custodian"[15/] of a child who is the subject of investigation, [16/] this group is neither "highly selective" nor "inherently suspect of criminal activity." Because the group encompasses all who might possibly have custody of a child, see Md. Code Ann. § 3-801, it would be untenable to suggest that it is "highly selective." Further, it is not a crime, in and of itself, to be the parent, guardian, or custodian of a child who has been abused. While the perpetrator of abuse may indeed be

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15/ Md. Code Ann. § 3-814(c).

16/ Child protection schemes generally contain a provision compelling production of the subject child. See, e.g., Mass. Gen. L. ch. 119, § 24; Cal. Welf. & Inst. Code §338 (West). See pp. 24-25, supra.

one of these individuals, he may not necessarily be so: the child may have suffered abuse at the hand of some other caretaker, such as a teacher, relative, or other household member.

Moreover, a statutory scheme compelling the production of a child whose safety is in question is not "intended to facilitate criminal convictions," Byers, 402 U.S. at 430, but rather constitutes one component of an overall scheme designed to protect children who may be the subjects of abuse and neglect. See pp. 15-16, supra. That these laws require a child protection agency to investigate suspected cases of abuse and provide support services where necessary, illustrates that the laws are designed to promote the welfare of children. The possibility that a child protection agency's investigatory efforts

might provide "a link in the chain of evidence," Byers, 402 U.S. at 432, quoting Hoffman v. United States, 341 U.S. 479, 486 (1951), leading to the prosecution and conviction of an individual for child abuse does not work to transform the statutory scheme from a protective to a criminal one. Cf. Marchetti v. United States, 390 U.S. 39, 56-57 (1968) (Court striking down "ingeniously drawn legislation," the aim of which was to obtain evidence from persons involved in criminal activity for use in their prosecution).

This Court has recognized that child abuse is especially difficult to detect. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987). Visual observation of a child is a vital tool with which to ascertain whether the child has been the victim of abuse. See pp. 18-21, supra. Here, the

compelling interest in favor of production decisively outweighs whatever limited incriminating effect production of the child might cause for the custodian. A holding that the Fifth Amendment privilege allows a parent or custodian to conceal from a child protection agency the physical condition of a child would all but render it impossible for such agencies to fulfill their statutory mandates. In that event, many cases of abuse would go undetected and many children would be left unprotected.

IV. THE EXTENSION OF IMMUNITY TO A RECALCITRANT PARENT OR CUSTODIAN IS NOT A SATISFACTORY TOOL TO PROTECT CHILDREN FROM ABUSE AND NEGLECT.

Assuming for purposes of argument that production of a child is testimonial, the extension of immunity

from prosecution, pursuant to which the State might be able to compel production of the child,[17/] is not a solution to the Fifth Amendment question raised in this case and it is not an appropriate response to the States' need to protect children from abuse.

The States should not be required to choose between protecting children and punishing those who abuse them. Moreover, child abusers should not be able to avoid prosecution by refusing to produce, until immunity is extracted, a child who is in jeopardy; otherwise, the incentive to hide the child would become too powerful.

Further, the extension of immunity, if available, would not guarantee

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17/ See Kastigar v. United States, 406 U.S. 441, 458 (1980), reh'g denied, 408 U.S. 931 (1981).

cooperation by the parent or custodian or expeditious access to a child at risk. A grant of immunity need only be "as broad as . . . the privilege against self-incrimination, Murphy v. Waterfront Comm'n, 378 U.S. 52, 107 (1964) (White, J., concurring)," motion denied, 379 U.S. 898 (1964); Doe I, 465 U.S. at 617 n.17. Use immunity, whereby the witness is protected from the use in any criminal proceedings against him of his testimony or other information compelled from him under oath, is constitutionally sufficient. Kastigar v. United States, 406 U.S. 441, 449, 453 (1972) reh'g denied, 408 U.S. 931 (1972).[18/] Under a use immunity scheme, the State

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18/ Some States provide only for use immunity, although a majority provide for the broader transactional immunity. See National Ass'n of Attorneys General, Organized Crime Control Legislation (1974 and 1979 Supp.).

may still prosecute the immunized witness if it can show that it has an "independent, legitimate source for the disputed evidence." Murphy, 378 U.S. at 79 n.18. Thus, a parent or custodian given use immunity might refuse to cooperate for fear that a prosecution may follow in any event on the basis of the information from independent sources. Thus, she may be willing to bear the sanction for refusing to produce or disclose the whereabouts of the child rather than risk harsher penalties following a criminal prosecution. See Piccirillo v. New York, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting); Tierney v. United States, 409 U.S. 1232, 1233-34 (1972); In the Matter of Vance A., 105 Misc.2d 254, 432 N.Y.S.2d 137, 141 n.7 (1980). See also LaFave and Israel, Criminal Procedure, Vol. 1, §8.11 (1984).

On the other hand, under the broader transactional immunity scheme, whereby the witness is immunized from prosecution for the offense concerning which she testifies regardless of the source of the evidence, see Kastigar, 406 U.S. at 449-50,[19/] a parent or custodian given immunity might also refuse to cooperate: the custodian may give incomplete or unhelpful information, recognizing that limited information will gain her full immunity from prosecution. See LaFave, supra. This will not aid a child at risk; it will not ensure that the child is found or that he will receive the immediate medical, psychological, or social care he needs.

19/ In Massachusetts, for example, transactional immunity is mandated as a matter of state constitutional law. Mass. Gen. L. ch. 233, § 20G; Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982).

Further, immunity extended under either system would not guarantee expeditious access to a child who may have been hidden by his parent or custodian. There could be many reasons in addition to fear of criminal prosecution which could motivate the parent or custodian not to produce the child or disclose his whereabouts, including: fear of termination of parental rights or custody, see Lassiter v. Department of Social Services, 452 U.S. 18, 27 n.3, 31 (1981) (Court recognizing that termination of parental rights is commonly based on alleged criminal activity), reh'g denied, 453 U.S. 927 (1981), Ullman v. United States, 350 U.S. 422, 430-31 (1956) (immunized testimony admissible in civil proceedings), reh'g denied, 351 U.S. 928 (1956), and In the Matter of Vance A.,

432 N.Y.S.2d at 141 n.7; fear of personal disgrace, Smith v. United States, 337 U.S. 137, 147 (1949); or fear of reprisal by another person who may be a co-perpetrator, see Piemonte v. United States, 367 U.S. 556, 558-59 (1961). The extension of immunity will not resolve these issues.[20/]

Immunity is not expeditiously or easily obtained. In Massachusetts, for example, a strict and time-consuming statutory procedure must be followed. Petition of the District Attorney for the Plymouth District, 391 Mass. 723, 726-27, 464 N.E.2d 62, 64-65 (1984), aff'd,

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20/ It should also be noted that immunity may not always be available as a matter of state law. For example, child abuse or neglect per se is not a crime in Massachusetts. Thus child abuse per se is not one of the listed crimes for which witness immunity is available in Massachusetts, Mass. Gen. L. ch. 233, §20D.

Palaza v. Superior Court, 393 Mass. 1001, 469 N.E.2d 60 (1984). In order for a witness to receive immunity, a district attorney or the Attorney General must convene a grand jury, initiate a grand jury proceeding and then call the witness before the grand jury. Mass. Gen. L. ch. 233, § 20E. Absent an active criminal investigation, the prosecutor may not call the witness to the grand jury merely to determine if she will invoke the Fifth Amendment. Petition of the District Attorney, 391 Mass. at 727, 464 N.E.2d at 65. After the witness invokes her Fifth Amendment rights, the district attorney or Attorney General must apply to a Single Justice of the Supreme Judicial Court for a grant of immunity. Mass. Gen. L. ch. 233, § 20E. If the Single Justice denies the petition for immunity,

that decision is unreviewable. See Petition of the District Attorney for the Northern District, 399 Mass. 1001, 502 N.E.2d 511 (1987).

As applied to a case like this one, the statutory immunity scheme set forth, for example, in Mass. Gen. L. ch. 233, §20C-20I would effectively transform an expeditious civil proceeding designed to locate and protect a child in danger of imminent physical injury or death into a cumbersome and time-consuming criminal proceeding. Such a result is unacceptable. Child protection agencies must be able to move expeditiously because "prompt conclusion of child abuse proceedings is essential to child welfare." In the Matter of Vance A., 432 N.Y.S.2d at 143; see also Darryl H., 801 F.2d at 899.

For the foregoing reasons, the availability of immunity is not a satisfactory answer to the Fifth Amendment question raised in this case.

CONCLUSION

In order to preserve the ability of the states to protect children in jeopardy from abuse or neglect, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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Nos. 88-1182 and 88-6651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

MAURICE M.,

Petitioner,

v.

JACQUELINE BOUKNIGHT,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF ADVOCATES FOR CHILDREN AND YOUTH INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

I. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

II. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF ADVOCATES FOR CHILDREN AND YOUTH INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Advocates for Children and Youth Inc. respectfully submits this Brief in Support of Petitioners Baltimore City Department of Social Services and Maurice M.[1]

INTEREST OF AMICUS CURIAE

Advocates for Children and Youth Inc. ("Advocates for Children" or "Amicus") has a strong interest in this case because the decision of the Court of Appeals of Maryland severely restricts the power of the juvenile courts to protect neglected and abused children.

Advocates for Children is a private, non-profit organization in Maryland that works with the public and private sectors to further the safe and healthy growth of children and families. Advocates for

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[1]The parties have consented to the filing of this brief. Copies of letters evidencing that consent are on file with the Clerk of this Court.

Children has approximately 125 members which include lawyers, social workers, providers of children's services, mental health professionals, representatives from the business community, private citizens, educators, public sector employees, physicians, foundations and coalitions. Advocates for Children seeks to ensure that the courts and public agencies are responsive to children who are in crisis because of child abuse and neglect, substance abuse, teen pregnancy, handicaps, homelessness and delinquency. Advocates for Children has worked to shorten the time that children spend in foster care, established a "Court Appointed Special Advocate" program for children appearing before the Juvenile Court, and worked to secure funds for therapeutic nurseries and mental health

services for abused and neglected children.

STATEMENT OF THE CASE

Maurice M., who was born on October 3, 1986, is an all too typical example of a neglected and abused child. By three months of age he had suffered serious physical harm of highly suspicious origins, and he had been hospitalized twice with confirmed multiple fractures. (J.A. 11-18.) Thereafter, in February of 1987, the Baltimore City Juvenile Court adjudicated him to be a Child in Need of Assistance ("CINA"). His mother, Respondent Jacqueline Bouknight, did not contest that CINA determination. Following a period of time in foster care away from his mother, physical custody of Maurice was returned to Ms. Bouknight in July of 1987, subject to the court's jurisdiction and an Order of Protective

Supervision to the Petitioner Baltimore City Department of Social Services ("DSS"). Under this order, Ms. Bouknight agreed to "cooperate" with DSS. (J.A. 27-28.)

Maurice has disappeared, and his mother has refused to cooperate with DSS. She steadfastly refuses to produce Maurice before the Juvenile Court or to tell anyone in authority where he is. Acting on the motion of DSS, the Juvenile Court cited Ms. Bouknight in civil contempt and ordered her incarcerated until she purged herself of contempt either by producing Maurice before the court or by telling someone in authority where he is so that he can be brought before the court. (App. Pet. Cert. 81a-82a.)

The Court of Appeals of Maryland, with two judges dissenting, reversed the Juvenile Court's contempt citation, holding that it violated Ms. Bouknight's Fifth Amendment privilege against self-incrimination, and ordered her immediate release from jail. In Re Maurice M., 314 Md. 391, 550 A.2d 1135 (1988). (App. Pet. Cert. 15a-80a.) On the application of DSS, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted a stay of the decision of the Court of Appeals pending the filing and disposition of DSS's Petition for Writ of Certiorari. Baltimore City Department of Social Services v. Bouknight, ___ U.S. ___, 109 S. Ct. 571 (1988). That Petition was granted by this Court on April 3, 1989.

ARGUMENT

I. A COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED INFANT SON DOES NOT COMPEL INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment of the United States Constitution provides in pertinent part that "No person ... shall be compelled in any criminal case to be a witness against himself." Thus our inquiry in this case is whether the Court Order directing Petitioner Jacqueline Bouknight to produce her previously abused infant son compels her to be a witness against herself.

In Schmerber v. California, 384 U.S. 757 (1966), this Court explored the meaning of the Fifth Amendment's prohibition of being a witness against oneself and concluded:

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.
> 384 U.S. at 764.

The issue in Schmerber was whether requiring an individual involved in an automobile accident to give a blood sample violated that individual's Fifth Amendment privilege against self-incrimination. Although this Court acknowledged that the blood test was compelled by the State, and was an attempt by the State to discover evidence that might be used against Schmerber, this Court concluded that Schmerber was not compelled to be a witness against himself:

> Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not

inadmissible on privilege grounds.
384 U.S. at 764.

Applying the same rationale, this Court has held that an individual may be compelled to stand in a line-up, United States v. Wade, 388 U.S. 218, 221-23 (1967); to provide a handwriting sample, Gilbert v. California, 388 U.S. 263, 266-67 (1967); and to provide a voice exemplar, United States v. Dionisio, 410 U.S. 1, 7 (1973). Although the acts listed above are potentially incriminating, they may be compelled by the State because they do not require the individual "to disclose any knowledge he might have" or "to speak his guilt," Wade, supra at 222-23.

Under the holdings of Schmerber and its progeny, Ms. Bouknight's compelled production of her infant son Maurice is neither testimony nor communication and

therefore is not barred by the Fifth Amendment. Ms. Bouknight can produce Maurice without saying one word. By producing him, she is not disclosing any knowledge that she might have nor is she in any way admitting any guilt. Maurice is real evidence, not testimonial, and even though it could be argued that Maurice is evidence that the State at some point might use against Ms. Bouknight, under Schmerber the Fifth Amendment still would not excuse her from producing him.

In Fisher v. United States, 425 U.S. 391 (1976) and later in Doe v. United States, 465 U.S. 605 (1984) ("Doe I"), this Court analyzed the Fifth Amendment issues surrounding the production of subpoenaed documents. After concluding in Fisher that the contents of an accountant's workpapers are not

privileged, this Court went on to examine whether the taxpayer's act of producing the subpoenaed workpapers is privileged. This Court concluded that the production of subpoenaed documents might constitute privileged testimonial communication, since the individual producing the documents would tacitly admit that the papers existed, were in his possession and control, and were those described in the subpoena. Fisher, 425 U.S. at 410. However, this Court found that these tacit averments by the taxpayer have such "minimal testimonial significance" that the Fifth Amendment is not implicated. 425 U.S. at 411-12.[2]

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[2]In Doe I, supra, this Court deferred to the findings of the lower court that the act of producing the records in question was testimonial self-incrimination and therefore privileged. 465 U.S. at 617.

In two recent cases, this Court further explored the parameters of when the Fifth Amendment privilege applies to the production of records. In Braswell v. United States, 487 U.S. ____, 108 S. Ct. 2284 (1988), this Court held that the custodian of corporate records must produce those records although they may be personally incriminating to him since he held the records as a representative of the corporation, and not in a personal capacity. Doe v. United States, 487 U.S. ____, 108 S. Ct. 234 (1988) ("Doe II") dealt with whether the Fifth Amendment privilege barred an individual from being compelled to sign a consent authorizing foreign banks to disclose his records to the government. This Court concluded that neither the consent, which described only hypothetical records and did not acknowledge the existence of accounts

relating to or controlled by the petitioner, nor its execution had any testimonial significance.

In light of the analysis in Fisher, supra, and Doe II, supra, Ms. Bouknight's production of Maurice could be viewed as a tacit acknowledgement by her that first, the child produced is in fact her son Maurice and that second, she has sufficient control over him to enable her to produce him. Amicus submits that such acknowledgements have little if no testimonial significance at all. As to the first, Maurice can be identified by independent means such as photographs, hospital records, third parties, and the like. As to the second, Maurice was placed in the custody of Ms. Bouknight by the Juvenile Court on July 17, 1987 (J.A. 27.) Thus, like the custodian of records in Braswell, supra, it is

presumed that she has a measure of control over him. Thus, Ms. Bouknight's production of Maurice should not be prohibited by the Fifth Amendment since any implications that can be drawn therefrom are of such "minimal testimonial significance." Fisher, supra, at 411-12.

Amicus submits that the Maryland Court of Appeals was wrong in its conclusion that producing Maurice is "implicitly at least a testimonial communication" since his production would incriminate Ms. Bouknight "in the event a crime had been committed upon Maurice's person." In Re Maurice M., 314 Md. 391, 404, 550 A.2d 1135, 1141 (1988). To produce Maurice, Ms. Bouknight does not have to speak to the Court or to the authorities at all. She does not have to say where Maurice has been, who he has

been with or what, if anything, has happened to him. All she must do is produce him. It is hard to see how his mere production incriminates her in any way in any crime against Maurice.

This Court has spoken often and eloquently of the history of the Fifth Amendment privilege against self-incrimination:

> Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber--the inquisitional method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. Doe v. United States, 487 U.S. ____, ____, 108 S. Ct. 2341, 2348, (1988).

Certainly Amicus believes that the Fifth Amendment privilege against self-incrimination is not only an essential

individual right, but is an essential cornerstone of our system of justice. However, Amicus asserts that for the reasons discussed above, the privilege does not and should not apply in this case. All Ms. Bouknight is required to do to purge herself of the contempt is to produce her infant son. Under the holdings of this Court, the Fifth Amendment does not shield her from doing so.

II. EVEN IF THE FIFTH AMENDMENT PRIVILEGE IS IMPLICATED BY A COURT ORDER TO PRODUCE A CHILD, THE PRIVILEGE IS OVERCOME BY THE IMPORTANT SOCIETAL INTEREST IN PROTECTING CHILDREN IN JEOPARDY OF SERIOUS INJURY

Even assuming for a moment that the Fifth Amendment privilege against self-incrimination applies to the production of Maurice by Ms. Bouknight, the privilege is not absolute and at times, must give way to competing public needs.

In California v. Byers, 402 U.S. 424 (1971), the issue was whether a California statute requiring a driver involved in an automobile accident resulting in property damage to stop and give his name and address infringed the Fifth Amendment privilege against self-incrimination. In resolving the "tension" between the state's need for information and the individual's right against self-incrimination, this Court concluded that the tension must be resolved by a balancing of "the public need" and "the individual claim to constitutional protection" and that "neither interest can be treated lightly." 402 U.S. at 427 (Burger, C.J. plurality). In striking the balance in favor of the public need for information, the plurality opinion noted that although the California Vehicle Code defines some criminal

offenses, it is essentially regulatory, not criminal in nature, and was intended "to aid the satisfaction of civil liabilities arising from automobile accidents and not criminal convictions." 402 U.S. at 428. When balanced against a minimal risk of self-incrimination to all drivers, the public need for information prevailed.

Likewise § 3-814(c) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, which allows the Juvenile Court to compel the production of children whose parents fail to bring them before the Court when requested to do so, is not criminal in nature but rather is civil -- its purpose is to ensure that children who need the care and protection of the Juvenile Court receive it.

As in Byers, supra, the risk of self-incrimination in this case is minimal at best since the Maryland statute is not aimed at a "highly selective group inherently suspect of criminal activities" but rather is "essentially noncriminal and regulatory." Albertson v. SACB, 382 U.S. 70, 79 (1965). Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, so concluded in this case when he wrote that the civil contempt order to obtain production of Maurice "is not essentially criminal in nature and aims primarily at securing the safety of the child." Baltimore City Department of Social Services v. Bouknight, ____ U.S. ____, 109 S. Ct. 571, 573 (1988) (Rehnquist, C.J., Circuit Justice).

In applying the balancing test of Byers to the instant case, Chief Justice

Rehnquist, as Circuit Justice for the Fourth Circuit, concluded:

> Protecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents. Baltimore City Department of Social Services, supra, at 573.

In New York v. Quarles, 467 U.S. 649 (1984), this Court again recognized that the Fifth Amendment privilege is not absolute. In fashioning the exigent circumstances exception to the Fifth Amendment privilege, this Court struck the balance in favor of "overriding considerations of public safety." 467 U.S. at 653.

Like in Quarles, overriding considerations of public safety are present in this case as well -- the safety of children who need the assistance of the Juvenile Court.

In Lefkowitz v. Turley, 414 U.S. 70 (1973) this Court did not find the State's interest in maintaining the integrity of the civil service system sufficiently strong to overcome an individual's Fifth Amendment right not to give compelled testimony. Lefkowitz is very different from the instant case in that Lefkowitz involved the compelling of testimony, whereas in the instant case, no testimony at all is required.

The obligation of the States, in general, and the juvenile courts, in particular, to protect children in jeopardy is a well-established obligation recognized by this Court in Palmire v. Sidoti, 466 U.S. 429, 433 (1986):

> The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.

This is a serious case that has grave implications for children all across our nation. The State's interest is clear -- to protect children. Maurice too has an interest in this case and he must not be forgotten. There are thousands of children like Maurice who desperately need the safe haven that the Juvenile Court can provide.[3] For many, the Juvenile Court is their last line of defense. It is the only thing that stands between them and a continual life of misery and deprivation. To allow parents to refuse to produce their children before the Juvenile Court by

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[3]For example, in Maryland, the number of children entering foster care placement through the Juvenile Courts because of abuse, neglect or other problems increased from 1,653 during 1983 to 3,009 during 1988. 1987 Annual Report of the Maryland Foster Care Review Board; "Official Statistics of the Maryland Foster Care Review Board," Compiled by Charles R. Cooper, Assistant Administrator, May 22, 1989.

virtue of a misapplication of the Fifth Amendment privilege destroys the Juvenile Court System and obliterates the essential protection that it affords children, like Maurice, who are in jeopardy.

The balance between Ms. Bouknight's constitutional right on the one hand, and the State's interest in protecting children and Maurice's right to be protected on the other hand, must be struck in favor of Maurice and the State. To do otherwise is to leave the State powerless to protect abused children, and to leave such children at the mercy of their abusers. Amicus urges this Court to strike the balance in favor of the children, for they cannot protect themselves, but this Court can protect them.

SUMMARY OF ARGUMENT

In order for the Fifth Amendment privilege against self-incrimination to apply, the act in question must be compelled, self-incriminatory and a testimonial communication. Schmerber, supra. Even if an act meets all three of these requirements, the Fifth Amendment privilege still does not apply if the communication is of minimal testimonial significance. Fisher, supra. The privilege does not shield Ms. Bouknight from producing her previously abused infant son. She does not have to say or do anything, all she must do is produce him, and any testimonial inferences drawn from his production are of minimal significance at best.

Even if the Fifth Amendment privilege against self-incrimination applies in this case, when balanced against the

State's interest in protecting children and Maurice's interest in having that protection, the Fifth Amendment must yield to those interests.

CONCLUSION

We respectfully urge this Court to reverse the judgment of the Maryland Court of appeals.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

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v.
JACQUELINE BOUKNIGHT,
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QUESTIONS PRESENTED

1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues affecting state and local governments.

At stake in this case is the power of a state or local government to protect abused children. In August 1987 the Circuit Court for Baltimore City, Division of Juvenile Causes, declared Maurice M., the infant son of respondent Jacqueline Bouknight, to be a Child in Need of Assistance and subject to protective supervision by petitioner Baltimore City Department of Social Services ("DSS" or "the State"). Respondent, after stipulating to the order for protective supervision, defied it by failing to cooperate with DSS.

Upon a petition from the State, which had been unable to observe Maurice for over seven months, the court ordered respondent to produce the child, and, when she refused to do so, found her in contempt. The court rejected respondent's claim that the Fifth Amendment privilege against self-incrimination justified her refusal to produce Maurice or to disclose his whereabouts. The Maryland Court of Appeals vacated the lower court's judgment, and this Court stayed the Court of Appeals' order pending resolution of this appeal.

Amici's concern is that sustaining this Fifth Amendment claim would, in many cases, make it virtually impossible for government social service agencies to determine whether a child is being abused, and, if so, to prevent such abuse. In addition, recognition of the Fifth Amendment claim in this context would necessarily make state and local government agencies reluctant to return children that have been placed in the custody of the State to their natural parents. To uphold respondent's claim thus would not only jeopardize children's health and safety, but also frustrate realization of the basic values inherent in familial relations.

The facts in *DeShaney v. Winnebago County Dep't of Social Services*, 109 S. Ct. 998 (1989), highlighted the difficulties experienced by state and local government agencies in reconciling the custody rights of a child's natural parents with the duty to protect the child from

abuse. The present case illustrates the effort of one State to prevent injuries to children of the type involved in *DeShaney*. Such efforts are stymied if the State cannot determine whether the child is safe or needs protection. The decision of the Maryland Court of Appeals in this case, by depriving the State of its power to compel production of a child, severely impairs the State's ability to fulfill its *parens patriae* obligation to protect children from abuse.

To uphold the Fifth Amendment claim in this case is especially egregious in view of respondent's agreement that the State exercise protective supervision over her child. Such agreements are unenforceable if the State cannot compel production of the child to determine whether he has been the victim of abuse or neglect. The decision below, by effectively inviting parental defiance of such an agreement, eliminates its usefulness as an alternative to the extremes of either abandoning children to possibly abusive parents or committing the children to state custody.

Amici submit that the judgment of the Court of Appeals is wrong. Because this Court's decision will have a direct effect on the ability of state and local governments to protect the welfare of children, a matter of outstanding importance to *amici* and their members, they submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

After being hospitalized for multiple fractures at the age of less than four months, Maurice M. was discharged on February 10, 1987, to the custody of the State. Pursuant to an Order of Protective Supervision entered on August 18, 1987, the court declared Maurice a Child in Need of Assistance and placed him in the custody of his

[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

mother, respondent Jacqueline Bouknight, subject to the supervision of the Baltimore City Department of Social Services ("DSS" or "the State").

On the ground that respondent had failed to cooperate with DSS under the terms of the order of protective supervision, DSS in April 1988 filed a motion to hold respondent in contempt. At a hearing on April 20, 1988, at which respondent failed to appear, the court issued a warrant for her arrest and an order to show cause why she should not be held in contempt, and announced that she would be jailed if she failed to produce Maurice.

Upon her arrest on April 27, 1988, respondent was brought before the court and questioned about the whereabouts of Maurice. She stated that the child was with her sister in Dallas, Texas; pending verification of that information, the court ordered that she be held in jail. When, on April 28, 1988, the information proved incorrect, the court found respondent in contempt and ordered that she remain in jail until purged of her contempt. The court made it clear that the production of Maurice, by any means, would serve to purge the contempt.

At a subsequent hearing on May 18, 1988, respondent's counsel raised the claim that for respondent to purge herself of contempt she would be compelled, in violation of the Fifth Amendment, to incriminate herself. The court on May 26, 1988, after considering the parties' written memoranda and oral arguments on the Fifth Amendment claim, found it meritless because respondent need not testify to purge herself of contempt. The court explained that any manner of production of Maurice—either a means involving respondent or one wholly independent of any action on her part—would serve for such purgation.

The Maryland Court of Appeals reviewed the case on an expedited basis. It held on December 19, 1988, that

the contempt order violated respondent's Fifth Amendment privilege against self-incrimination and ordered her release from prison. The court refused to stay its judgment pending potential review in this Court.

This Court granted a stay of the Court of Appeals' judgment and, on April 3, 1989, agreed to hear the case. Almost one year had elapsed since the State first sought judicial intervention to locate Maurice.

SUMMARY OF ARGUMENT

This case threatens a critical state interest: the protection of an abused child. Against that interest respondent claims the right, pursuant to the Fifth Amendment, to withhold information without which the State cannot possibly help two-year-old Maurice. Respondent's asserted Fifth Amendment privilege cannot be credited under the circumstances of this case. Her interest in avoiding any possibility of self-incrimination simply does not outweigh the State's interest and its obligation to protect Maurice.

The Fifth Amendment does not grant an absolute privilege against self-incrimination. Determining whether the privilege precludes the government from requiring certain disclosures necessarily involves balancing the public need for the disclosures against the risk that the disclosure requirement will force those subject to it to incriminate themselves.

This Court in *California v. Byers*, 402 U.S. 424 (1971) (plurality opinion), articulated a two-part test for evaluating the acceptability of a disclosure requirement that presents some risk of self-incrimination: if (1) the purpose of the requirement is unrelated to criminal law enforcement, and (2) the persons subject to the requirement are not a "highly selective group inherently suspect of criminal activities" (*id.* at 430) (citation omitted), the argument that the Fifth Amendment forbids the re-

quirement is weakened. In such cases, a strong public need for information will justify a government demand for disclosure of the information.

The challenge to the order for the production of Maurice, under the two-part test of *Byers*, presents a weak argument for Fifth Amendment protection. First, the purpose of the order has nothing to do with criminal law enforcement: it was issued pursuant to a civil law, Maryland's Juvenile Causes Act, in order to ascertain and, if necessary, to protect the child's health and safety. Second, the persons potentially subject to such a production requirement include all parents, guardians, and custodians of children for whom the State may perceive a need to act to ensure proper "care, protection, and wholesome mental and physical development." Md. Cts. & Jud. Proc. Code Ann. § 3-802(a)(1) (1984). Only a small minority of this group would ever be suspected of criminal child abuse.

Opposing respondent's weak self-incrimination claim is the State's compelling interest in protecting Maurice. The State in this case, as in any case involving a child subject to its jurisdiction, has a *parens patriae* obligation to provide necessary assistance to the child. The factual history here strongly indicates that Maurice requires state assistance; due to his lack of such assistance for more than a year at the time of the filing of this brief, the current need to ascertain his condition is critical.

This Court has recognized that the State's *parens patriae* duty to protect the best interests of a child must overcome parents' constitutional claims in a variety of contexts. Thus the Court has rejected parental claims that the First Amendment bars state intervention to protect the interests of children. The state courts have rejected both First and Fifth Amendment claims. Respondent's claim should similarly be rejected.

Whatever privilege against self-incrimination respondent may claim to justify her refusal to produce her son, that privilege cannot, in a society that recognizes its obligation to protect its children, permit her to prevent the government from coming to the aid of a helpless, previously abused child who may be in physical jeopardy. Neither the Fifth Amendment nor this Court's decisions implementing that Amendment require such a repugnant result.

ARGUMENT

ANY CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION IMPLICATED HERE IS OUTWEIGHED BY THE STATE'S INTEREST IN PROTECTING CHILDREN THROUGH CIVIL PROCEEDINGS.

The Fifth Amendment privilege against self-incrimination (made applicable to the States through the Fourteenth Amendment) is not absolute.[2] *California v. Byers*, 402 U.S. 424 (1971) (plurality opinion); *see id.* at 452 (Harlan, J., concurring in the judgment). Determining the proper application of the privilege requires "balancing the public need [for disclosures] on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly." *Id.* at 427 (plurality opinion).[3] In this case, the individual claim to

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[2] *Amici* support petitioners' position that the Fifth Amendment is not implicated in this case because the contempt order at issue does not require action that is testimonial in nature. To avoid duplicating petitioners' arguments, *amici* focus on the second issue presented by this case: assuming that a testimonial response is necessary to determine the location of the child, is the Fifth Amendment a bar to the State's ability to obtain that response and thus to protect the child? Society's interest in finding and protecting the child would, of course, be equally strong if the contempt order did in fact require testimonial action.

[3] Justice Harlan, who concurred in the judgment, also agreed that the public interests involved are to be considered in determining whether the Fifth Amendment bars requiring disclosure. 402 U.S. at 451-52.

Fifth Amendment protection is weak, and the public need for disclosure is strong.

A. The Fifth Amendment Claim Is Weak.

Pursuant to the Self-Incrimination Clause of the Fifth Amendment, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This Clause has been interpreted to grant an individual the privilege to withhold testimony in a variety of proceedings—civil or criminal, administrative or judicial, investigatory or adjudicatory—when the individual reasonably believes that the testimony could be used in a criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). To invoke the privilege the claimant must be confronted by "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

The fact that information may constitute incriminating evidence is not itself enough to preclude requiring its disclosure in every case. As this Court recognized in *California v. Byers*, there are situations in which the possibility of criminal prosecution based on information sought by the government may be very real, yet insufficient to defeat the strong policies that favor disclosure of the information. *See* 402 U.S. at 428 (plurality opinion); *id.* at 451-52 (Harlan, J., concurring in the judgment). When a disclosure requirement is (1) pursuant to a regulatory scheme the purpose of which is civil in nature, and (2) not directed at a "'highly selective group inherently suspect of criminal activities'" (*id.* at 430 (plurality opinion), quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965)), the risk of self-incrimination is so diminished that the requirement cannot be said to present a cognizable violation of the Fifth Amendment. 402 U.S. at 430 (plurality opinion). Both criteria are satisfied in this case.

1. The purpose of the State's order for production of the child is noncriminal in nature: it is to protect the health and safety of a child in need of assistance.

The Baltimore Circuit Court ordered that respondent produce Maurice in order to ensure that the child was safe.[4] When the court issued a warrant for respondent's arrest, it did so solely for this purpose. As the court explained, "we are not picking her up for purposes of punishing her. We are picking her up in an attempt to find the child." J.A. 53. The court further explained at that time that if respondent failed to produce Maurice, it would hold her in contempt of court because "[w]hat this court has to look at is what is in the best interest of this child. And quite frankly, that child is paramount on this court's mind." J.A. 54.

After respondent refused to produce Maurice, the court did hold her in contempt. The court took this action in accordance with Maryland's Juvenile Causes Act, which provides that "[i]f a parent, guardian, or custodian fails to bring the child before the court when requested, the court may . . . proceed against the parent, guardian, or custodian for contempt." Md. Cts. & Jud. Proc. Code Ann. § 3-814(c) (1984). It is clear from the Juvenile Causes Act itself that the court's action was remedial, rather than punitive in nature. The relevant purposes of the Act are (*id.* § 3-802(a)):

> (1) To provide for the care, protection, and wholesome mental and physical development of children . . . and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;
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> • • • •
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> (3) To conserve and strengthen the child's family ties and to separate a child from his parents only

[4] Respondent is the only apparent source of information regarding the child's whereabouts. His father died in March 1988.

when necessary for his welfare or in the interest of public safety; [and]

* * * *

(5) To provide judicial procedures for carrying out the provisions of this subtitle.[5]

Maryland's Juvenile Causes Act is typical of the child abuse statutes adopted in every State and the District of Columbia. See Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723, 725 n.10 (1987) (citing statutes). The federal government has also recognized the importance of protecting children from abuse: the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C.A. § 5101 *et seq.*, enacted in 1974, provides funding for the States to be used in "developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs." *Id.* § 5106a(a) (Supp. 1989). The primary purpose of the federal law, like the state child abuse statutes, is to ensure that children are protected from abuse through parental and custodial treatment and training.[6]

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[5] Section 3-802(a) identifies the other purposes of the Act as:

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior; [and]

* * * *

(4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents.

[6] See S. Rep. No. 167, 95th Cong., 1st Sess. 59, *reprinted* in 1978 U.S. Code Cong. & Admin. News 557, 602 (statement of Arabella Martinez, Assistant Secretary for Human Development, Department of Health, Education, and Welfare). The federal statute conditions funding for state programs in part on the State's maintaining requirements for reporting of child abuse and procedures to ensure that "upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child." 42 U.S.C.A. § 5106a(b)(2) (Supp. 1989). The federal law does *not* require the States to impose criminal sanctions on child abuse offenders.

In *Byers*, this Court found it significant that the reporting requirement alleged to violate the Self-Incrimination Clause was part of a statute that, while defining some criminal offenses, "is essentially regulatory, not criminal." 402 U.S. at 430 (plurality opinion).[7] The plurality noted that the requirement, part of the California Vehicle Code, "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Ibid.* In this case, it is clear that the purpose of the order of production is similarly nonpunitive: it is to protect the health and welfare of Maurice. See, *e.g.*, J.A. 44-45 ("The Court: Where is the baby? Bring me the baby. If I see the baby is okay, fine. I am happy. But somebody has to protect that child. Based on what I have already heard, this child is in serious jeopardy."). As the court explained, some enforcement mechanism was required to provide such protection, and the order of production, coupled with the threat of civil contempt, was the sole mechanism available. See J.A. 55 ("The Court: If [respondent] fails to produce the child, then I will order her held without bail in Baltimore City Jail until the child is found. I don't think I have much choice. If someone can give me some other reasonable alternative, I will be glad to consider it.").

It is even clearer here than in *Byers* that the requirement at issue has an extremely important noncriminal justification. The public purpose of the reporting requirement in *Byers* was to promote the satisfaction of civil liabilities arising from automobile accidents; here, the

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[7] Justice Harlan's concurrence also focused in its analysis on "the noncriminal governmental purpose in securing the information." 402 U.S. at 458.

order of production is designed to protect—perhaps to save—a child's life. There can be no fair suggestion that this order, and the statute pursuant to which it was issued, does not have a strong noncriminal purpose.

2. *Orders to produce a child are not directed at a highly selective group inherently suspect of criminal activities.*

Byers also requires examination of the nature of the group subject to the disclosure requirement. If the requirement is directed at a "highly selective group inherently suspect of criminal activities," then the requirement may be said to create an intolerable risk of self-incrimination. 402 U.S. at 430 (plurality opinion) (citation omitted). If, however, the requirement is imposed on—and in fact affects—a group of which only a minority risks self-incrimination through compliance, then the requirement likely does not violate the Fifth Amendment. The fact that *some* persons may undergo a risk of self-incrimination as a result of the requirement is not dispositive: the applicability of the privilege depends on how serious the risk of incrimination created by the requirement is *in general*. Thus in *Byers*, the fact that California's Vehicle Code was directed at all drivers in California who are involved in automobile accidents, and that most accidents occur without creating criminal liability, indicated that the Code's disclosure requirement posed, in general, a low risk of self-incrimination. *See id.* at 431.

The order of production in this case implements the statutory requirement that a parent, guardian, or custodian must, on pain of contempt, bring a child before the court when requested. See Md. Cts. & Jud. Proc. Code Ann. § 3-814(c).[8] That statutory requirement is

[8] The case, however, would not be different if the order were based on the court's inherent equitable power. Such an order, like one based on statutory authority, would be utilized in the majority of cases to require production of children by persons who would not be inherently suspect of criminal behavior.

not directed at "a highly selective group inherently suspect of criminal activities." In the vast majority of cases where the State requires production of a child there is no suspicion of criminal activity: although the State may suspect that the child has been neglected or abused, in only a small minority of cases does it suspect that such neglect or abuse has been so severe as to trigger criminal liability. In fact, less than ten percent of all child abuse cases go forward to prosecution. See Whitcomb, Shapiro & Stellwager, *When the Victim Is a Child: Issues for Judges and Prosecutors* at i (National Institute of Justice 1985).

It is not material whether in this particular case there is a suspicion of criminal liability. Just as the reporting requirement in *Byers* would be imposed on a group that would include some criminal suspects (and indeed, Byers himself raised the Fifth Amendment claim after being charged with violating both the reporting requirement and a related criminal provision), so too some parents ordered to produce their children will subsequently be charged with criminal child abuse. That does not mean, however, that either demand is directed at a "highly selective group inherently suspect of criminal activities."

Decisions barring governmental orders for disclosures because of a Fifth Amendment privilege are distinguishable on exactly this ground. *See, e.g., Leary v. United States*, 395 U.S. 6 (1969) (requirement to report unregistered transfers of marijuana violates the Fifth Amendment because possession of marijuana is a crime); *Haynes v. United States*, 390 U.S. 85 (1968) (requirement to register firearms in one's possession violates the Fifth Amendment because possession of unregistered firearms is a federal offense); *Grosso v. United States*,

390 U.S. 62 (1968) (requirement that persons engaged in gambling disclose records of their gambling activities violates the Fifth Amendment because gambling is a crime); *Marchetti v. United States*, 390 U.S. 39 (1968) (same); *Albertson v. SACB*, 382 U.S. 70 (1965) (registration requirement for Communist Party members violates the Fifth Amendment because Communist Party membership may constitute a federal offense).

Since *Byers*, lower courts have used its two-part test to find various reporting requirements valid under the Fifth Amendment. *See, e.g., United States v. Flores*, 753 F.2d 1499 (9th Cir. 1985) (upholding the mandatory notification to carriers that firearms are being shipped to an unlicensed person); *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) (same); *United States v. Des Jardins*, 747 F.2d 499 (9th Cir. 1984) (upholding mandatory disclosure of the transfer of more than $5,000 into or out of the United States); *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (same); *see also Pauldino v. United States*, 500 F.2d 1369 (10th Cir. 1974) (upholding use of income tax return stating that defendant's occupation was gambling as evidence of unlawful gambling-related activity).

The disclosure requirements in those cases were at least as likely to apply selectively to criminal suspects as is the order for production of a child. Moreover, the public purpose underlying those requirements was much less critical than is the purpose of the order in this case. Clearly, the court ordered that respondent produce Maurice to protect the child's health and safety, not to obtain information concerning possible criminal activity. In light of that critical purpose, and the fact that such orders are not selectively directed at criminal suspects, respondent's claim to the privilege against self-incrimination is extremely weak.

B. The *Parens Patriae* Interest Of The State Is Sufficiently Strong To Override Constitutional Claims Of Parents Or Custodians.

This Court has long recognized the State's paramount *parens patriae* interest in the welfare of children. As the Court stated in *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944): "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." Mindful of this interest, the Court has often determined that the best interests of the child override constitutional claims of parents or custodians no less worthy of protection in our constitutional scheme than the Fifth Amendment.

Prince itself is compelling authority for the proposition that the State's interest in Maurice's welfare must overcome any Fifth Amendment privilege that respondent may hold. In *Prince*, a Massachusetts statute prohibited sales of newspapers and magazines by minors in public places. Prince, a member of the Jehovah's Witnesses, was convicted for violation of the statute as a result of having permitted her minor niece, of whom she was custodian, to sell religious literature on the streets.

Prince urged that her conviction violated the First Amendment guarantee of freedom of religion. This Court forcefully disagreed:

> Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the com-

> munity or the child to communicable disease or the latter to ill health or death.

321 U.S. at 166-67 (citations omitted).

Prince stands as authority for broader state intervention than is necessary to overturn the decision of the Maryland Court of Appeals in the instant case. The child in *Prince* was in no apparent danger of physical harm, whereas Maurice may well be in such danger.

The Court undertook a similar balancing of parents' constitutional rights against the *parens patriae* interest of the State in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There, the Court considered the right of the State to compel children's school attendance beyond the eighth grade over the religious objections of Amish parents. Although ultimately holding that the free exercise claim was of sufficient force to overcome that state interest, this Court was careful to narrow its holding (*id.* at 233-34):

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. . . . The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child . . . .

Finally, this Court's *per curiam* affirmance in *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968), is further evidence of the Court's adherence to the *Prince* standard and is clearly significant here because of the balance struck between the asserted constitutional right and the State's *parens patriae* interest in protecting the physical safety of the child. In that case, this Court was presented with a free exercise challenge to a state statute which, as applied to plaintiffs, permitted the

State to overrule parental objections and administer blood transfusions to children in need of such treatment. This Court, relying upon *Prince*, upheld the constitutionality of the state statute as applied, thus reaffirming the right of the State to intervene to protect children when their health or safety is threatened.[9]

In other contexts as well, this Court has noted the importance of "the State's right—indeed, duty—to protect minor children." *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).[10] That right and duty is so paramount that it forms the basis for judicial severance of the parental bond, a bond that itself is deemed "essential" (*Meyer v.*

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[9] The state courts likewise have authorized medical treatment for children despite parental objections based on the free exercise of religion. *See, e.g., In re Ivey*, 319 So. 2d 53 (Fla. App. 1975); *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).

These cases cannot be distinguished on the ground that the Fifth Amendment right is somehow stronger than the First Amendment right because the claimant of the Fifth Amendment privilege may incur a criminal penalty if the privilege is denied. In *Prince*, the constitutional claim was made on an appeal from a state conviction; the failure of the constitutional argument there thus resulted in the affirmance of the conviction. Indeed, religious beliefs generally have been rejected as a defense in criminal prosecutions involving failure to provide medical attention for a child. *See Commonwealth v. Barnhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985), *app. denied*, 517 Pa. 620, 538 A.2d 874, *cert. denied*, 109 S.Ct. 55 (1988); *Craig v. State*, 220 Md. 590, 155 A.2d 684 (1959).

[10] *See also New York v. Ferber*, 458 U.S. 747, 756-58 (1982) (State's "compelling" interest in "safeguarding the physical and psychological well-being of a minor" is a justification for statute regulating child pornography); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (government interest in "well-being of its youth" justifies regulation of radio broadcast that is indecent but not obscene); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding state statute criminalizing the sale of certain magazines to minors).

Nebraska, 262 U.S. 390, 399 (1923)) and one of the "basic civil rights of man" (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); and which is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the Ninth Amendment. *Stanley*, 405 U.S. at 651.

The Maryland Court of Appeals is apparently the first court to have faced the question whether an order to produce a child in need of assistance violates the privilege against self-incrimination. Other state courts, however, have dealt with self-incrimination challenges in the context of child abuse proceedings, and have in each case determined that the interests of the child weigh heavily against any asserted Fifth Amendment claim of the parent or guardian.

For example, the state courts have apparently unanimously concluded that, when a child's interests are at stake, the Fifth Amendment does not preclude conditioning a parent's right to retain custody of the child on the parent's disclosing incriminating information. Thus the State may require parents to undergo therapeutic treatment or psychological examinations or else forfeit the right to keep their children. *See, e.g., In re H.R.K.*, 433 N.W.2d 46 (Iowa App. 1988) (State may condition parental custody on the completion of a sexual abuse treatment program in which parents must admit that sexual abuse of a child occurred); *In re J.W. & A.W.*, 415 N.W.2d 879 (Minn. 1987) (State may condition parental custody on the results of a psychological evaluation likely to be favorable only if the parents reveal incriminating information); *accord In re S.A.V. & S.M.V.*, 392 N.W.2d 260 (Minn. App. 1986); *In re Johnson*, 142 Mich. App. 764, 371 N.W.2d 446 (1985); *In re Fay G.*, 120 N.H. 153, 412 A.2d 1012 (1980).

The State also may create judicial presumptions of parental responsibility for the condition of a child, and

those presumptions will control the outcome of a custody determination if the parent refuses to disclose information regarding that condition. *See, e.g., In re Simpson*, 126 Misc. 2d 162, 481 N.Y.S.2d 293 (Fam. Ct. 1984); *In re Fred S.*, 66 Misc. 2d 683, 322 N.Y.S.2d 170 (Fam. Ct. 1971).

In addition, the state courts have found the best interests of the child dispositive in resolving Fifth Amendment claims regarding the sequence of parallel criminal and civil child abuse proceedings. Parents who have been named simultaneously as defendants in criminal and civil child abuse actions have argued that to proceed with the civil case while the criminal action is pending violates their privilege against self-incrimination because they cannot present an adequate civil defense without disclosing incriminating information. The courts have repeatedly refused to postpone civil actions on this ground, finding that "[e]xpedition is important because it is only if and after the allegations of abuse are sustained at a fact-finding trial that the Family Court has authority to determine the best plan for the child's long-term care. However, criminal charges based on acts of alleged child abuse generally pend for inordinate periods." *In re Vance A.*, 105 Misc. 2d 254, 432 N.Y.S.2d 137, 142 (Fam. Ct. 1980) (citation omitted); *accord In re Melissa M.*, 127 N.H. 710, 506 A.2d 324 (1986); *In re Germaine B.*, 86 A.D.2d 847, 447 N.Y.S.2d 448 (1st Dept. 1982).

Even in a criminal child abuse proceeding, the State's obligation to protect children plays a role in determining the degree of protection the Fifth Amendment will provide a parent. In *People v. Salinas*, 131 Cal. App. 3d 925, 182 Cal. Rptr. 683 (5th Dist. 1982), for example, the court found it necessary to consider the best interests of the child in order to resolve whether the mother's Fifth Amendment rights had been violated by the failure of an interrogator to provide her with *Miranda* warnings. Among other reasons, the fact that the allegedly

incriminating information the mother disclosed was necessary to provide emergency care to her child led the court to reject the mother's Fifth Amendment claim. The court concluded that:

> In balancing the interests of the child's well being, particularly in an emergency situation when a life is at stake, versus the need for protecting the alleged abuser's right against self-incrimination, we believe there is no question that the former interest outweighs the latter. . . . "Any other policy would reflect an indifference to human life."

182 Cal. Rptr. at 692 (quoting *People v. Riddle*, 83 Cal. App. 3d 563, 148 Cal. Rptr. 170, 179 (2d Dist. 1978), *cert. denied*, 440 U.S. 937 (1979)).

Whether or not the situation of two-year-old Maurice constitutes a medical emergency is, of course, unknown, and will not be known until he is found. The government's interest in finding Maurice is therefore increasingly critical. Surely that interest outweighs any Fifth Amendment right his mother may assert to refuse to produce him.[11]

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[11] This case should not be resolved by requiring the State to grant respondent immunity from the use of her testimony for criminal prosecution. To require States to grant use immunity (assuming they can do so) to parents in exchange for information about their children's whereabouts would create serious impediments to the State's ability to protect children.

Because of the difficulty in proving that independently obtained evidence was derived from sources not covered by the grant of immunity, use immunity can, as this Court recognized in *Braswell v. United States*, 108 S. Ct. 2284, 2294-95 (1988), make successful prosecution difficult if not impossible. The decision to grant such immunity should therefore be made only after careful consideration, by a prosecutor who is fully aware of all of the facts. This decision cannot, in the majority of child abuse or neglect cases, appropriately be made by the attorney representing the government in the civil family court proceeding. Thus a requirement of use immunity would make it necessary for civil and criminal attorneys to coordinate to reach decisions on when to grant immunity, which would impose a substantial burden on already overworked family court lawyers, case workers, and prosecutors. In addition, it would inevitably, and sometimes dangerously, prolong the process of obtaining information about abused children. Most important, the possibility of obtaining immunity would encourage parents to withhold information about their children's whereabouts, and significantly undermine the threat of prosecution as a deterrent to child abuse.

CONCLUSION

For the foregoing reasons, the judgment of the Maryland Court of Appeals should be reversed.

Respectfully submitted,

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